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## TRANSCRIPT OF RECORD

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

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No. 72

THE UNITED STATES OF AMERICA, PETITIONER

VS.

MRS. JULIA CAROLINE SPONENBARGER, ET AL.

---

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE EIGHTH CIRCUIT

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PETITION FOR CERTIORARI FILED MAY 26, 1939  
CERTIORARI GRANTED JUNE 5, 1939





**United States Circuit Court of Appeals**  
**EIGHTH CIRCUIT.**

---

**No. 11,090**

**AT LAW.**

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**MRS. JULIA CAROLINE SPONENBARGER, ET AL.,**  
**APPELLANTS,**

**vs.**

**UNITED STATES OF AMERICA, APPELLEE.**

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**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES**  
**FOR THE EASTERN DISTRICT OF ARKANSAS.**

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**FILED JANUARY 15, 1938.**

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# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 72

THE UNITED STATES OF AMERICA, PETITIONER

vs.

MRS. JULIA CAROLINE SPONENBARGER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE EIGHTH CIRCUIT

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1                      Praeceptum for Transcript.

In the United States District Court for the Western  
Division of the Eastern District of Arkansas.

Mrs. Julia Caroline Sponenbarger; Grady Miller as Receiver for the Southeast Arkansas Levee District; Alex H. Rowell and William R. Humphrey, as Receivers for the Cypress Creek Drainage District; Cypress Creek Drainage District; Mercantile-Commerce Bank and Trust Company and Mercantile-Commerce National Bank in St. Louis; and St. Louis Union Trust Company, Appellants,

No. 7984. vs.

The United States of America, Appellee.

To the Clerk of the United States District Court for the Western Division of the Eastern District of Arkansas:

You will please prepare a transcript of the record in the above styled case for perfecting the appeal to the United States Circuit Court of Appeals for the Eighth Circuit, and will include therein the following documents and records:

1. Petition (Complaint) filed August 11, 1934.
2. Stipulation for Transfer to Western Division.
3. Demurrer filed September 28, 1934.
4. Court Order on Demurrer.
5. Answer filed May 14, 1935.
6. Defendant's Motion to make Parties Plaintiff.
7. Court Order Sustaining Defendant's Motion to make Additional Parties Plaintiff.
8. Plaintiff's Assignment of Error, Re: Additional Parties.

9. Appearance and Protest of Grady Miller, as Receiver for the Southeast Arkansas Levee District.

10. Appearance and Protest of Alex H. Rowell and William R. Humphrey as Receivers of the Cypress Creek Drainage District.

11. Entry of Appearance and Answer of Mercantile-Commerce Bank & Trust Company and Mercantile-Commerce National Bank in St. Louis.

12. Separate Petitions of St. Louis Union Trust Company Individually and in its Own Right and as Trustee for Bondholders in a Pledge Instrument and Mortgage Executed by the Cypress Creek Drainage District, and by Red Fork Levee District.

13. Second Answer of the Defendant.

14. Order Substituting Cypress Creek Drainage District as a Party Plaintiff.

15. Entry of Appearance of Cypress Creek Drainage District.

16. The complete Bill of Exceptions.

17. Judgment entered October 21, 1937.

18. Motion for New Trial filed by Mercantile-Commerce Bank and Trust Company and Mercantile-Commerce National Bank in St. Louis.

19. Motion for New Trial filed by St. Louis Union Trust Company.

20. Court Order dated December 23, 1937, submitting Motion for New Trial filed by Mercantile-Commerce Bank and Trust Company and Mercantile-Commerce National Bank in St. Louis.

21. Memorandum of the Court overruling said Motion for New Trial.

22. Court Order overruling Motion of St. Louis Union Trust Company for a New Trial.

23. Amended Judgment dated December 23, 1937.

24. Notice of Appeal.

25. Petition for Appeal.

26. Assignment of Errors.

27. Order Allowing Appeal.

28. Bond on Appeal.

29. Citation on Appeal and Acceptance of Service.

30. This Praecept for Transcript, and Acceptance of Service Thereof.

**JULIA CAROLINE SPONEN-  
BARGER, Appellant.**

By Lamar Williamson, Monticello,  
Arkansas, and

By E. E. Hopson, McGeehee, Arkansas,  
Her Attorneys.

**GRADY MILLER AS RECEIVER FOR  
THE SOUTHEAST ARKANSAS  
LEVEE DISTRICT,**

By Joseph W. House, Little Rock,  
Arkansas, and

By Lamar Williamson, Monticello,  
Arkansas,

His Attorneys.

**ALEX H. ROWELL AND WILLIAM R.  
HUMPHREY AS RECEIVERS FOR  
THE CYPRESS CREEK DRAINAGE  
DISTRICT,**

By DeWitt Poe, McGeehee, Arkansas, And

By Lamar Williamson, Monticello,  
Arkansas, And

By Hendrix Rowell, Pine Bluff, Arkansas,  
Their Attorneys.

**CYPRESS CREEK DRAINAGE DIS-  
TRICT.**

By DeWitt Poe, McGeehee, Arkansas, And

By Lamar Williamson, Monticello,  
Arkansas,

Its Attorneys.

**MERCANTILE-COMMERCE BANK &  
TRUST COMPANY AND MERCAN-  
TILE - COMMERCE NATIONAL  
BANK IN ST. LOUIS,**

By Fred Armstrong, Attorney, of Thomp-  
son, Mitchell, Thompson & Young, St.  
Louis, Missouri.



ST. LOUIS UNION TRUST COMPANY,  
INDIVIDUALLY AND IN ITS OWN  
RIGHT, AND AS TRUSTEE FOR  
BONDHOLDERS IN A PLEDGE AND  
MORTGAGE EXECUTED BY THE  
CYPRESS CREEK DRAINAGE DIS-  
TRICT,

By Henry Davis, Attorney, of Bryan, Wil-  
liams, Cave & McPheeters, St. Louis,  
Missouri.

ST. LOUIS UNION TRUST COMPANY,  
INDIVIDUALLY AND IN ITS OWN  
RIGHT, AND AS TRUSTEE FOR  
BONDHOLDERS IN A PLEDGE AND  
MORTGAGE EXECUTED BY THE  
SOUTHEAST ARKANSAS LEVEE  
DISTRICT,

By Henry Davis, Attorney, of Bryan, Wil-  
liams, Cave & McPheeters, St. Louis,  
Missouri.

Service of the foregoing Praecipe for Transcript is hereby  
acknowledged this January 7th, 1937.

FRED A. ISGRIG, United States District  
Attorney, Attorney for the Appellee.

Endorsed: "Filed Jan. 7, 1938, Sid B. Redding, Clerk."

4

Petition.

In the District Court of the United States for the  
Eastern Division of the Eastern District of  
Arkansas.

Mrs. Julia Caroline Sponenbarger, Petitioner,  
No. 7984 vs. At Law  
The United States of America, Defendant.

Comes the above named plaintiff and for cause of action  
against the defendant, the United States Government, the  
plaintiff pleads and alleges:

I.

The plaintiff, Mrs. Julia Caroline Sponenbarger, is a citi-  
zen of the State of Arkansas, and is a resident of Desha  
County, in the State of Arkansas.

## II.

This petition and suit is of a civil nature, and constitutes a claim founded upon the Constitution of the United States, Fifth Amendment; and upon an Act of Congress (being Public Document No. 391, 70th Congress, Senate Bill 3740; Title 33, U. S. C. A., sections 702a to 702m, inclusive, Chapter 15), being an Act entitled: "An Act for the Control of Floods on the Mississippi River and Its Tributaries, and For Other Purposes," approved May 15, 1928, hereinafter called the "Flood Control Act"; and is founded upon an implied contract of the Government of the United States to pay for damages in a cause not sounding in tort; and also involves the title of, and damage to, land and personal property situated in Desha County in the State of Arkansas.

5 The amount of the claim herein, exclusive of interest and costs, exceeds the value of \$3,000.00 and is less than the value of \$10,000.00.

## III.

The plaintiff alleges that under said Flood Control Act of Congress the United States adopted, and enacted into law, a project for the flood control of the Mississippi River in its alluvial valley, and for its improvement from the Head of Passes to Cape Girardeau, Missouri, in accordance with the engineering plan set forth and recommended in the report submitted by the Chief Engineers to the Secretary of War, dated December 1, 1927, and printed in House Document No. 90, 70th Congress, 1st Session, which engineering plan is commonly called the "Jadwin Plan." The Act provides for raising the levees of the Mississippi River generally for three feet, for improving the carrying capacity of the main channel of the River by revetment work, and for limiting the flood waters in this channel to its safe capacity through the provision of specified diversion channels. Among these is the Boeuf Floodway which will carry excess flood waters from a point below the mouth of the Arkansas River, through and over the plaintiff's land and property in Desha County, Arkansas, to and through the Boeuf River Basin into the back water area at the mouth of the Red River in the State of Louisiana. The Plan leaves the section of the Mississippi River levee running from approximately the mouth of Cypress Creek in Desha County, Arkansas, South to approximately Luna Landing in Chicot County, Arkansas (being the levee lying East of the plaintiff's property and heretofore protecting it against Mississippi River Floods), known as the "fuse-plug levee"; at its height on the date of the passage

of the Act; but as the levees elsewhere have been, and are to be, raised  $3\frac{1}{2}$  feet and materially strengthened, preventing overflow at other points, the volume of water passing into this diversion channel has been, and will be, greatly increased.

The Flood Control Act provides for the construction of guide or protection levees running in a southerly direction to be built on either side of the floodway which will direct the water into a specified channel. These guide levees have not been constructed, but their construction will serve only to protect other areas from inundation and will only intensify the inundation of plaintiff's property which lies between said proposed guide levees.

The maximum previous overflow of water into the Boeuf Basin occurred in 1927 and was estimated at 450,000 cubic feet per second in times of extraordinary flood. Said Flood Control Act involves an intentional, additional, occasional flooding, damaging and destroying of plaintiff's property as the direct consequence of the construction of the entire project (Jadwin Plan) by the Government to relieve the channel of the River in times of high water, all of which was contemplated by the Congress when enacting said Flood Control Act, and constitutes a taking of plaintiff's private property for public use for which the Government of the United States is liable to the plaintiff, as upon an implied contract, for which compensation as might have been awarded plaintiff had condemnation proceedings been instituted by the Government of the United States.

#### IV:

Said Flood Control Act provided that a Board to consist of the Chief of Engineers, the President of the Mississippi River Commission, and a civil engineer, chosen from civil life, be appointed by the President of the United States, by and with the consent and advice of the Senate, which Board was authorized and directed to consider the engineering differences between the adopted project (Jadwin Plan) and the plans recommended by the Mississippi River Commission in its special report dated November 28, 1927, and to recommend to the President such action as such Board might deem necessary, to be taken in respect to such engineering differences, and it was provided further that the decision of the President upon all recommendations or questions submitted to him by such Board should be followed in carrying out the project adopted. There were very substantial differences in the plan of the Mississippi River Commission for the Boeuf River Floodway diversion as it affected

the plaintiff's property, and the plan of the Army Engineers (Jadwin Plan), so that the plaintiffs could not know just how his property was to be effected until those engineering differences were adjusted and settled.

Said Special Board created by Section 1 of said Flood Control Act reported to the President of the United States on August 8, 1928, recommending the engineering of the Jadwin Plan (the adopted project), and on August 13, 1928, the President of the United States approved "the policy and method of dealing with the problem set out in the report, dated August 8, 1928," of said Special Board, and the Jadwin Plan thereby, on August 13, 1928, for the first time became definite, certain and fixed as a matter of law, insofar as it affects the plaintiff's property herein involved. Work on the project by the United States Government began immediately on August 13, 1928, funds for the purpose being available, and construction work on this plan of flood control is now approximately 70% complete, and plaintiff's property has thus been taken.

#### V.

The project of flood control as adopted by the Flood Control Act of May 15, 1928, for which the Government of the United States assumed responsibility, differed from the old flood control system of levees, and levees only, by the deliberate creation of certain diversion channels to be sacrificed for the protection of the balance of the alluvial valley of the Mississippi River. The then Chief of Engineers, in his report to the Secretary of War, which was submitted by the Secretary of War to the Congress in connection with the Jadwin Plan, which was enacted into law by said Flood Control Act, states that:

"The recommended plan (Jadwin Plan) fundamentally differs from the present project in that it limits the amount of flood water carried in the main river to its safe capacity, and sends the surplus water through lateral floodways. Its essential features and their functions are:

8 "Floodways from Cairo to New Madrid, from the Arkansas River through the Tensas Basin to the Red River, and from the Red through the Atchafalaya Basin to the Gulf of Mexico. These will relieve the main channel of the water it can not carry and lower the floods to stages at which the levees can carry them." (Document No. 90, House of Representatives, 70th Congress, 1st Session pp. 34).

"The Jadwin Plan, as enacted into law by said Flood Control Act, further describes the plan for flood control as it



affects the plaintiff's property, which is protected only by the "fuse-plug" or "safety-plug" section of the Levee immediately below the mouth of Cypress Creek in Desha County, Arkansas, as follows:

"16. From the mouth of the Arkansas (River) to the Old River, at the mouth of the Red (River), extreme floods can not be carried between levees of the Mississippi (River) without dangerous increase in their heights. A floodway for excess floods is provided down the Boeuf River, on the west side of the river. Excess water can not be carried through the section on the east side, since it would be forced back into the main river by the highlands on the east bank below Vicksburg and have to be carried thence for 160 miles between the main river levees to the mouth of the Red River. The entrance to the floodway is closed by a safety-plug section of the levee, at present grade, which is located at Cypress Creek near the mouth of the Arkansas. To insure their safety until this section opens, the levees of the Mississippi (River), from the Arkansas to the Red, will be raised about 3 feet. To prevent flood waters from entering the Tensas Basin, except into the floodway during high floods, the levees on the south side of the Arkansas will be strengthened and raised about 3 feet as far upstream as necessary.

"17. The Section at the head of the floodway will protect the land within the floodway levees against any flood up to one of the magnitude of the 1922 flood. A flood of the magnitude somewhere between that of 1922 and of 1927 will break it, turning the excess water down the floodway, which will carry it safely to the backwater area at the mouth of the Red River." (Parentheses ours). (Document No. 90, p. 6).

Said Jadwin Plan, enacted into law by said Flood Control Act, further recites, and the plaintiff alleges:

"The confinement of flood flows by levees has substantially raised the flood heights." (Document No. 90, p. 19).

"96. The confinement of the Mississippi River within levees and the great development of drainage systems in recent years have raised flood stages materially and this raising has exceeded estimates made in the past. Were it attempted to hold the water within the present levee lines by raising them, river stages are possible as much as • • • 14 feet above the present levee grade at Arkansas City, • • • The levees now have an average height of about 18 feet. The principal means to meet this situation is to spill the water

out of the main leveed channel at selected points when the stages reach the danger point.

"97. The water within the river channel does no damage whatever and it should be kept within the channel as long as possible. The excess must be spilled through safety valves when the volume exceeds the safe capacity of the river. These safety valves consist of one controlled spillway, several relief or fuse-plug levees at present grade and one levee of reduced height, all emptying into natural floodways wholly or partially leveed." (Document No. 90, p. 23).

"The levees generally will be raised about 3 feet, so that the selected, weaker relief levees will be at about the elevation of the present levee top and will surely serve their purpose." (Document No. 90, p. 24).

"118. To insure that excess water will leave the main river, a fuse plug section of the levee in the vicinity of Cypress Creek must be kept at its present grade, viz., 3 feet below the new levee grade. This relatively weak section will be long enough to discharge the greatest predicted possible excess water over and above the capacity of the leveed river below. In order to limit the land in the Tensas Basin overflowed by it, levees will be constructed on each side of the Boeuf River Bottom, where natural ridges do not serve, from the Cypress Creek levee to backwater in the lower Tensas Basin. Arkansas City is to be enclosed with a levee. This floodway will be wide enough to carry the water without clearing and without maintenance except for the side levees." (Document No. 90, p. 28).

These side levees, or guide levees, have not yet become constructed by the Government; but plaintiff's property is in the floodway whether said floodway be controlled or uncontrolled as at the present, and is subject to inundation and destruction whenever the fuse-plug levee gives way to protect the balance of the alluvial valley of the Mississippi River.

"Due to an increase in flood height by reason of levee construction and drainage, it has been estimated that a stage over the present top at Cypress Creek might occur in the long run about once in twelve years." (Document No. 90, p. 28).

"121. The remainder of the alluvial valley on each side of this stretch of the river, barring accident, will have complete protection from all possible floods." (House Document No. 90, p. 28)..



"The draw down from Cypress Creek relief levee into the Boeuf River diversion below makes it possible to protect the lower part of this section of the river from superfloods without excessive levee raising. . . . the average amount that levees are to be raised throughout is approximately  $3\frac{1}{2}$  feet above the present adopted grade." (Document No. 90, pp. 29-30).

11 "The plan proposes the strengthening of the levees on the south side of the Arkansas and Red Rivers and raising them about 3 feet, as far upstream as is necessary for that purpose." (Document No. 90, p. 30).

## VI.

Section 4 of said Flood Control Act provides:

"Sec. 4. The United States shall provide flowage rights for additional destructive flood waters that will pass by reason of diversions from the main channel of the Mississippi River . . . ."

The waters that will flow into the Boeuf Floodway or diversion channel will all be diverted from the main channel of the Mississippi River at a place and in a manner which has never been true before, but which subjects the plaintiff's property to inundation, damage and destruction whenever a flood stage is reached in the Mississippi River sufficient to overtop or wash away the fuse-plug levee hereinbefore mentioned. The main levees of the Mississippi River have been strengthened and raised so as to now insure the flooding of the plaintiff's property at predetermined stages of the River. The purpose of leaving the fuse-plug levee hereinbefore mentioned (plaintiff's only protection) is solely for the purpose of having the water break over same at flood tide and flood this diversion channel or floodway in which plaintiff's property is situated. It is an uncontrolled spillway. There is no provision of law for rebuilding the fuse-plug levee when it washes out, but plaintiff's property will then be left free to the ravages of the escaping waters of the Mississippi River with no protection whatever.

Pursuant to the provisions of said Flood Control Act, from Helena South the levees on the west bank of the Mississippi River will be maintained at sufficient height to hold all of the flood waters which reach this point from the entire basin of the upper Mississippi River and all of its tributaries, carrying all of this water within the levees to a point about 12 miles distant from a similar levee on the South bank of the

12 Arkansas River. Through this gap the White River passes into the Mississippi River about midway between the lower end of the levee on the west bank of the Mississippi River above mentioned, and the mouth of the Arkansas River. Lying between these levee ends to the north and west of the 12 mile gap, is located a pool or basin of backwater some twelve hundred square miles in area into which will be poured all of the waters of the White River and its watershed, as well as the overflow on the north bank of the Arkansas River for a distance upstream to the locality of Pine Bluff, Arkansas.

It is not contemplated under the present law that any levee will be built along this stretch of the River. When this basin of twelve hundred square miles is filled, its outlet, together with all water coming down the White and Arkansas Rivers, will be discharged through the 12 mile gap above described.

This combined volume will be added to that in the main stream of the Mississippi River, consisting both of its own water brought down in its own channel from Cairo, Illinois, and also the quantity of water which will have been returned into the Mississippi River, under the present law, from the St. Francis River Basin north of Helena; then for a few miles the comparatively narrow channel of the main levees of the Mississippi River will carry this enormous volume of concentrated flood water until it reaches, and is hurled against, the fuse-plug levee at the head of the Boeuf River Basin hereinbefore referred to, a comparatively short distance from the plaintiff's property. The "fuse-plug" levee is so named because in due course during flood stages of the Mississippi River this stretch of the levee will break and be washed out when the river reaches the predetermined height fixed by the Army Engineers, in similar fashion to what happens when a current of electricity attains a designed voltage sufficient to blow out the fuse in electrical machinery. It is contemplated that this concentration of flood water upon the fuse-plug will overtop the fuse-plug levee and  
13 cause a crevasse through the fuse-plug levee which will gradually widen to include the whole of twenty or more miles of said relief levee if the condition of the Mississippi River so requires for the safety of the remainder of its alluvial valley.

The causes of damage to plaintiff's land and property, and the physical conditions involved in this litigation resulting in such damage, are identical to those involved and recited in the decision in the case of Patrick J. Hurley vs. F. Foster Kincaid Sr., 285 U. S. 95, 52 S. Ct. 267, 76 L. ed. 637, more

particularly described in the opinions of the courts in the same case below reported at 49 F. (2d) 768, affirmed 37 (2d) 602, except that the plaintiff's land is located at the very head of the floodway, a comparatively few miles distant from the fuse-plug levee, its only protection. When the fuse-plug levee breaks the plaintiff's property will be subjected to the immediate, destructive onrush of water, with little or no opportunity to rescue even movable property after the break.

## VII.

Prior to the adoption of the Flood Control Act, the plaintiff, and other property owners now protected only by said fuse-plug levee, had and exercised their legal right of protecting themselves against inundation by raising the present fuse-plug levee during flood times. This right of self-defense has been taken from the plaintiffs, and the owners of property similarly situated, by the Flood Control Act.

Paragraph numbered 120 of the adopted project provides as the key to the entire system of flood control that:

"The United States must have control over the Cypress Creek levee and keep it substantially at its present strength and present height." (Document No. 90, p. 28).

Paragraph numbered 118 of the adopted project further provides that:

14 "To insure that excess water will leave the main river, a fuse-plug section of the levee in the vicinity of Cypress Creek must be kept at its present strength and at its present grade, viz. 3 feet below the new levee grade."

## VIII.

Petitioner further relies upon the provision of Section 3 of said Flood Control Act which provides: "... if in carrying out the purpose of this act it shall be found that upon any stretch of the banks of the Mississippi River it is impracticable to construct levees, either because such construction is not economically justified, or because such construction would unreasonably restrict the flood channel, and lands in such stretch of the River are subjected to overflow and damage which are not now overflowed or damaged, by reason of the construction of levees on the opposite banks of the river, it shall be the duty of the Secretary of War and the Chief of Engineers to institute proceeding on behalf of the United States Government to acquire either the absolute ownership of the lands so subjected to overflow and damage or floodage rights over such lands."

Your petitioners allege that the levees on the opposite banks of the river from their property have been constructed and raised as hereinbefore described and as directed by law, so that their property is now subject to overflow and damage by the break of the fuse-plug levee within the meaning of this Section of said Flood Control Act, again constituting a taking of their property for which they are entitled to just compensation under the provisions of the Act, as well as under the Fifth Amendment to the Constitution of the United States.

Your petitioners further allege that by the express provision of Section 2 of said Flood Control Act "no local contribution to the project herein adopted is provided." Prior to the adoption of said Flood Control Act, the plaintiff enjoyed equal protection against flood menace, without discrimination, but the primary purpose of the said Flood Control Act is to protect the balance of the alluvial valley of the

15 Mississippi River by sacrificing the plaintiff's property and the property of others within the Boeuf River floodway similarly situated. Unless, therefore, plaintiff are compensated for all damages by them sustained as herein alleged, then the plaintiff will be forced to contribute their entire damages to the project, notwithstanding said provision of the Act to the contrary.

#### IX.

Plaintiffs plead and allege that they own the following described lands which are located within the area of the Boeuf River Floodway created by said Flood Control Act as hereinbefore described, the plaintiff's lands and property being described as follows, to-wit:

Southwest quarter of the Southwest quarter (SW $\frac{1}{4}$  SW $\frac{1}{4}$ ) of Section Thirty one (Sec. 31) in Township Twelve (12) South, Range One (1), West, in Desha County, Arkansas.

The fair market value of said lands and property before their taking and dedication by said Flood Control Act for public use as a flood way was \$5,000.00. The fair market value of said lands after their subjection to the servitude of said floodway was reduced to \$1,000.00. Plaintiffs have been damaged in the sum of \$4,000.00 by reason of the taking of their property for public use as a floodway as aforesaid.

Since the Government of the United States has assumed control of the flood water of the Mississippi River by the passage of said Flood Control Act and has intentionally dedicated the plaintiff's property as a floodway to be used



as aforesaid, plaintiff's property has been subject to flood menace at any and all times. The crops of any year may be washed away, and the uncertainty of the safety of said property makes it unwise to undertake to use said property at any time. Its usefulness, enjoyment and value has been practically destroyed.

## X.

16 The adopted project has had the effect of casting a cloud on the title of the plaintiff to their said land and property, and has destroyed its salable value, and has impaired and practically destroyed their use and enjoyment of same. The result of setting apart this area as a floodway or diversion channel, and of preventing the escape of the flood water of the Mississippi River elsewhere, has so destroyed the usefulness and value of plaintiff's property that they are now unable to borrow money on said property, or to sell or dispose of same, or to interest persons in operating said lands for farms, or for any other purpose, due to the fact that the Government of the United States has substantially taken possession of the property for a diversion channel or floodway of the Mississippi River.

Plaintiff further pleads that notwithstanding the fact that the Fifth Amendment of the Constitution of the United States provides: " . . . not shall any person . . . be deprived . . . of property without due process of law, nor shall private property be taken for public use without just compensation," and notwithstanding the provision of the Flood Control Act that the "United States shall provide flowage rights for additional destructive flood water that will pass by reason of diversion from the main channel of the Mississippi River," and notwithstanding the further provision of said Act that: "The Secretary of War may cause proceedings to be instituted for the acquirement by condemnation of any lands, easements or rights of way which, in the opinion of the Secretary of War, and the Chief of Engineers, are needed in carrying out this project, and said proceedings to be instituted in the United States District Court for the district in which the land, easement or right of way is located," no condemnation proceeding has been commenced against the plaintiff for his property, and no compensation has been paid him or offered him.

## XI.

Prior to the passage of said Flood Control Act, in order to secure protection of his property against the flood water of the Mississippi River, the plaintiff paid large sums of

money each year in the form of levee tax against their property for the purpose of enabling the Southeast Arkansas Levee District, which includes the plaintiff's property, to build levees along the river front of the Mississippi River. And in order to construct such levees, the said Southeast Arkansas Levee District, a quasi-municipal corporation created by the General Assembly of the State of Arkansas, issued bonds in a large amount to repay which the General Assembly of the State of Arkansas imposed an annual tax of 30c an acre on plaintiff's property. The Government of the United States has now taken from the Southeast Arkansas Levee District and the plaintiffs the right to defend the plaintiffs' property against the ravages of flood, and the plaintiffs have thereby completely lost their investment in the past, and the pledges of their property in the future to which plaintiffs submitted only in reliance upon their right to protect their property against floods. The Government of the United States has now dedicated the plaintiffs' property, and all others in the Boeuf River Floodway, as a floodway, but has not relieved the plaintiff's property of the amount of bonded indebtedness placed on plaintiffs' property for flood protection as aforesaid.

This is one of the elements of value which has been taken by the Government of the United States for which no compensation has been made.

## XII.

Furthermore, when the mouth of Cypress Creek was closed by levees, in order to prevent the plaintiffs' property, and other property similarly situated in the Boeuf River Floodway, from being destroyed, the plaintiffs' property became incorporated into the Cypress Creek Drainage District by Act of the General Assembly of the State of Arkansas. And in order to secure protection against flood menace, and in order to properly drain the lands from surface water which had been diverted over the plaintiffs' property by the closing of the mouth of Cypress Creek, the plaintiffs permitted his lands to become bonded to the extent of \$20.00 per acre in the form of benefits assessed against said property by the Cypress Creek Drainage District, which benefits were in turn pledged by the Cypress Creek Drainage District for the payment of an enormous issue of bonds by the District.

The present project by the United States Government has rendered this drainage system without value to the plaintiffs' property, and has destroyed the benefits assessed against their property, and is one of the elements which has



been taken and destroyed by the Government of the United States without just compensation.

### XIII.

Wherefore, the premises considered, plaintiffs pray judgment against the Government of the United States in the sum of Four Thousand [Dollars] (\$4,000), together with interest and costs thereon, and for all other and further general relief to which the premises and proof may show the plaintiffs entitled.

**MRS. JULIA CAROLINE SPONEN-  
BARGER, Plaintiff,**

By Lamar Williamson and  
E. E. Hopson, Attorneys.

19

Verification.

State of Arkansas,

County of Desha—ss.

I, Mrs. Julia Caroline Sponenbarger, the claimants, state on oath that said claimant is the owner of the property in the foregoing complaint; and that there has been no assignment or transfer of said claim or any part thereof, or interest therein, except as stated in the Petition; and that said claimants are justly entitled to the amount therein claimed from the United States after allowing all just credits and offsets; and that the claimant are citizens of the United States and have at all times borne true allegiance to the Government of the United States, and have not in any way voluntarily aided, abetted or given encouragement to rebellion against the said Government; and that the affiant and claimant believes the facts stated in said petition to be true.

In testimony of all of which said affiants have hereunto set their hand and seal on this 10th day of August, A. D., 1934.

**MRS. JULIA CAROLINE SPONEN-  
BARGER, Affiant.**

Subscribed and sworn to before the undersigned duly commissioned, qualified and acting Notary Public in and for said County and State on this 10th day of August, A. D., 1934.

**BESSIE DUNN,  
Notary Public.**

(Seal)

My commission expires: February 28, 1937.

Endorsed: "Filed Aug. 11, 1934. Sid B. Redding, Clerk."

20

(Demurrer of Defendant to Petition.)

Comes the United States of America, defendant herein, by Fred A. Isgrig, United States Attorney for the Eastern District of Arkansas, and demurs to the complaint of the plaintiff herein, and for cause states:

That the petition of the plaintiff does not state a cause of action against the defendant within the jurisdiction of this Court under Section 24, Paragraph 20, of the Judicial Code, U. S. C., Title 28, Section 41, Sub-division 20, in that the allegations do not show a taking of plaintiff's property.

Wherefore, defendant prays that the suit of the petitioner herein be dismissed, and for all other just and proper relief.

FRED A. ISGRIG,  
United States Attorney for the  
Eastern District of Arkansas.

Endorsed: "Filed Sept. 28, 1934, Sid B. Redding, Clerk."

21 (Stipulation for Transfer of Cause from Eastern Division to Western Division of Eastern District of Arkansas.)

In the United States District Court, Eastern Division of the Eastern District of Arkansas.

Mrs. Julia Caroline Sponenbarger, Petitioner,  
No. 892. vs.  
United States of America, Defendant.

The plaintiff and defendant, by their respective attorneys of record, hereby agree and stipulate that the above styled cause shall be transferred to the United States District Court for the Western Division of the Eastern District of Arkansas, sitting at Little Rock, Arkansas, for trial and final decree, pursuant to the authority of Section 119 United States Code Annotated (Judicial Code Sec. 58; Title 28, United States Code Annotated, Sec. 119); and pray the court to so order.

Respectfully submitted,

MRS. JULIA CAROLINE SPONEN-  
BARGER, Petitioner,  
By Lamar Williamson, Attorney.

UNITED STATES OF AMERICA,  
 Defendant,  
 By Fred A. Isgrig,  
 United States Attorney for the Eastern  
 District of Arkansas.

Endorsed: "Filed Oct. 12, 1934, Sid B. Redding, Clerk."

22 (Order Overruling Demurrer to Petition.)

In the District Court of the United States for the Eastern District of Arkansas, Western Division.

Mrs. Julia Caroline Sponenbarger, Petitioner,  
 No. 7984. vs.  
 United States of America, Defendant.

Now on this day is presented to the court the demurrer of the United States of America pleading that the petition of the plaintiff does not state a cause of action against the defendant within the jurisdiction of this court, in that the allegations do not show a taking of plaintiff's property; and after hearing argument of counsel for both parties, the court being well and fully advised in the premises, doth find that the demurrer should be overruled.

It Is, Therefore, By The Court Considered, Ordered And Adjudged that the defendant's demurrer be and the same is hereby overruled and denied, to which ruling of the court the defendant excepts and asks that its exceptions be noted of record which is hereby ordered; and the defendant is given sixty days from this date within which to file answer to plaintiff's petition.

Done and ordered of record this 23rd day of November, 1934.

JOHN E. MARTINEAU, Judge.

Endorsed: "Filed Nov. 24, 1934, Sid B. Redding, Clerk."

23 Answers.

Comes the defendant, the United States of America, by Fred A. Isgrig, United States Attorney for the Eastern District of Arkansas, and files herewith its answer.

The defendant admits that the plaintiff is a citizen of the State of Arkansas, that her petition in suit is of a civil nature.

The defendant admits that the United States of America, under what is known as the Flood Control Act of Congress,

adopted a project for the flood control of the Mississippi River.

The defendant denies that the volume of water passing into the so-called diversion channel has been and will be greatly increased by the plan adopted, and denies that fuse-plug levees have been constructed, and denies their construction will tend to intensify and increase the inundation of plaintiff's property.

Defendant denies that under the contemplated plan of flood control that it will cause an intentional additional flooding or cause additional damage or destruction of plaintiff's property, and denies that a direct consequence of the construction of the entire project by the Government constitutes a taking of plaintiff's private property for public use.

Defendant denies that water which will flood into the proposed floodway or diversion channel will be diverted from the main channel of the Mississippi River in a manner and place which has not heretofore been true, and denies that this subject plaintiff's property to destruction  
24 whenever a flood stage is reached in the Mississippi River, or will increase in any way the hazard or danger of high water or flood upon the land of this plaintiff.

Defendant denies that the lands of the plaintiff in question are left without any protection whatever, but alleges that it has the same protection which it has heretofore had with reference to the levee and that it has the further protection in other improvements and changes in the channel in that in case of high flood a less amount of water will flow over plaintiff's land [then] did flow over it during the flood of 1927.

Defendant admits that prior to the adoption of the Flood Control Act that plaintiff and other property owners had exercised their legal rights in protecting themselves against inundation by raising the levee during flood times. Defendant specifically denies that this right of strengthening this levee has been taken from the plaintiff, and specifically denies that this right of self defense has been taken from the plaintiff.

Defendant specifically denies that the plaintiff in this case is entitled to damages because of the failure of the Government or the defendant to increase the heights of the levees which have heretofore protected the property at this point, and specifically denies that because the Government has strengthened the levees at other points that this gives rise to any just cause of complaint or legal action or claim for

damages against the defendant, the United States Government.

The defendant denies that the flood control plan or the improvement upon the Mississippi River has in any way affected the market value of plaintiff's land, and denies that the plaintiff has been damaged by this manner or means in any sum whatsoever and specifically denies that the plaintiff has been damaged in the sum of Four Thousand  
25 Dollars (\$4,000.00), or in any other sum whatever, and specifically denies that the act of the Government in this case amounts to the taking of the plaintiff's land or property for public use as a flood-way or for any other purpose.

Defendant specifically denies that the property of the plaintiff has been subjected to any increased menace from flood than that which ordinarily existed at all times, denies that the crops of any year are any more apt to be washed away, and denies that the uncertainty of the safety of said property makes it unwise to undertake to use the property at any time, denies that its usefulness has been practically destroyed.

Defendant denies that the attempted project has cast a cloud on the title of the plaintiff to her said land and property, denies that it has practically destroyed the sale value of the land, and denies it has ~~practically~~ destroyed her use and enjoyment of same.

Defendant denies that as a result of said plan that the property, its usefulness and value has been destroyed, and denies that as a result of this act that plaintiff is unable to borrow money on said property, and denies that as a consequence of said act she is unable to sell or dispose of same or to interest persons in the operation of said land for a farm or any other purpose, and denies that this condition as it exists is equivalent to the Government substantially taking possession of plaintiff's property for a flood channel or diversion of the Mississippi River, and specifically denies that the Government of the United States, the defendant herein, has taken possession of the property in any manner whatever.

Defendant admits that prior to the passage of the Flood Control Act that the plaintiff was taxed for the purpose of enabling the Southeast Arkansas Levee District to build levees along the front of the Mississippi River. Defendant imposed not the amount of the tax and is not advised  
26 whether the plaintiff paid large sums of money each year in the form of a levee tax, and therefore asks that the plaintiff be required to make such proof.



The defendant herein, the United States of America, denies that it has taken from plaintiff the right to defend plaintiff's property from the loss of flood, and denies that plaintiff has completely lost the investment in the past and the privileges of her property in the future.

The defendant knows not whether the property of the plaintiff is incorporated in the Cypress Drainage District and requests that strict proof be supplied thereto and as to the amount of taxes, but the defendant, the United States of America, specifically denies that the present project of the United States Government has rendered this drainage system without value to the plaintiff's property and has destroyed the benefits assessed against this property and is one of the elements that has been taken and destroyed by the Government of the United States, and specifically denies that the Government has in any way [interfered] with the right of the plaintiff to protect herself from floods, and specifically denies that any act of the Government has amounted to a taking or a confiscation of the lands of the plaintiff, and denies that the United States Government, the defendant herein, has taken the lands of the plaintiff as contemplated and provided for in the statutes.

Wherefore, having fully answered, the defendant prays that the suit of the plaintiff be dismissed, that the defendant be dismissed with its costs herein expended, and for all other just and proper relief which the premises and proof may show the defendant is entitled.

FRED A. ISGRIG,  
United States Attorney for the  
Eastern District of Arkansas.

Endorsed: "Filed May 14, 1935, Sid B. Redding, Clerk."

27 (Motion of Defendant to Make Additional Parties  
Plaintiffs.)

In the United States District Court, Eastern District of Arkansas, Western Division.

Mrs. Julia Caroline Spokenbarger, Plaintiff,  
No. 7984. vs. At Law.

The United States of America, Defendant.

Comes now the United States of America, the defendant herein, through and by its attorneys of record, and petitions the Court in the manner following, to-wit:

I.

That heretofore and on the 11th day of August, 1934, the plaintiff herein filed in the District Court of the United

States for the Eastern District of Arkansas, Eastern Division, her cause of action before said Court, under the provisions of the statutes of the United States, for the purpose of asserting a claim not sounding in tort against the United States, and that the said petitioner, as plaintiff, filed said cause of action individually. Said cause of action was transferred from the Eastern Division to the Western Division of the Eastern District of Arkansas on October 15, 1934.

## II.

Your petitioner further states that for a proper and complete adjudication of the issues therein involved as set out in plaintiff's petition it is necessary to cause other persons and corporations to be joined therein as each and all of said corporations and individuals as hereinafter stated allege some lien or claim against said premises described in said petition and alleged by said plaintiff to be her property. That such corporations and individuals and their interests therein are as follows, to-wit:

28 That said petition in paragraph I on page 13 thereof alleges that the premises described are within the territory embraced within the Southeast Arkansas Levee District, a quasi-municipal corporation created by the General Assembly of the State of Arkansas, and which said corporation has issued bonds for the payment of which the said plaintiff is compelled to contribute her pro rata share by and through the process of taxation. That the said Southeast Arkansas Levee District was duly organized and incorporated under and by virtue of the laws of the State of Arkansas for all acts and purposes defined by Act No. 83 of the Acts of the General Assembly of the State of Arkansas for the year 1917, to which reference is particularly made.

That the Mercantile-Commerce Bank and Trust Company is a banking corporation with powers of trust attached, organized under the laws of the State of Missouri, and was at the times hereinafter mentioned. That the said bank and trust company did on the 5th day of February, 1932, file its complaint as a bill in equity against the Southeast Arkansas Levee District wherein it, the said Mercantile-Commerce Bank and Trust Company alleged that they were trustees authorized under their power of trust to act as trustees in behalf of the holders of certain bonds theretofore issued by the Southeast Arkansas Levee District for the payment of which the said Southeast Arkansas Levee District had defaulted.

That thereafter and on the 6th day of February, 1932, one Grady Miller, Esq., was appointed receiver by the United States District Court for the Eastern District of Arkansas, Western Division, upon the aforesaid application of the said Mercantile-Commerce National [Bank] and Trust Company and the Mercantile Commerce National Bank of St. Louis.

That the St. Louis Union Trust Company and Franklin-American Trust Company were at the times hereinafter mentioned duly organized banking and trust companies under the laws of the State of Missouri with such powers as are conferred upon such institutions by said Missouri statutes. That the Cypress Creek Drainage District is a quasi-municipal corporation duly created by Act No. 110 of the General Assembly of the State of Arkansas for the year 1911, and as amended by subsequent acts, for all acts and purposes defined in said Act No. 110 and as amended by subsequent acts relative thereto. That the St. Louis Union Trust Company and Franklin-American Trust Company were trustees under a certain deed of trust or indenture for the security of certain bonds theretofore lawfully issued by said Cypress Creek Drainage District and recorded in the office of the Recorder of Deeds of Desha County, Arkansas, (and other Counties within said Commonwealth) on the 10th day of May, 1916, and recorded in Record Book No. 30 at page 286, to which reference is made. That thereafter and on the 31st day of December, 1929, the said St. Louis Union Trust Company and Franklin-American Trust Company, as plaintiffs, filed its bill in equity in the United States District Court for the Eastern District of Arkansas, Western Division, for receiver to take charge of the affairs of said defendant District, collect its taxes and apply them to the payment of delinquent bonds and coupons, and that thereafter and prior to the filing of plaintiff's petition herein the United States District Court for the Eastern District of Arkansas, Western Division, duly appointed Alex H. Rowell, of Pine Bluff, Arkansas, and William R. Humphrey, of St. Louis, Missouri, as receivers for the Cypress Creek Drainage District, and that the said Alex H. Rowell and William R. Humphrey are now active in such capacity under the appointment as aforesaid.

That after the appointment of said receivers for the Cypress Creek Drainage District and the Southeast Arkansas Levee District various and sundry parties, firms, corporation, acting in the capacity of bondholders' committees and trustees for disclosed bondholders did intervene for and on behalf of said named bondholders who were then owners

and possessors of various bond issues which had been law-  
fully theretofore issued by the Levee and Drainage  
30 Districts heretofore named. That the aforesaid in-  
terests are interested in the outcome of the litigation  
heretofore brought by the said Mrs. Julia Caroline Sponen-  
barger for the reason that the land which she claims to own  
and which is described in said petition is within the various  
and sundry limits and boundaries of both the Levee and  
Drainage Districts and to the extent of the benefits assessed  
against her premises and for the payment thereof the said  
corporations, receivers, bondholders' committees, etc., have  
some interest, the extent of which your petitioner is unable  
to state, in the outcome of said litigation.

Your petitioner further states that said Levee and Drain-  
age Districts, through and by their authorized representa-  
tives, have asserted their claims by filing suits in the Court  
of Claims alleging certain overt acts on the part of the  
United States in the alleged destruction of their securities.  
Your petitioner further advises this Court that on the 11th  
day of September, 1935, the Cypress Creek Drainage District  
in Desha and other Counties in Arkansas filed its petition in  
bankruptcy under the amended Bankruptcy Act for the pur-  
pose of re-organization and suggesting to the Court a plan  
of re-adjustment, and which said action is now pending in  
said Court. That for the purpose of a full and complete ad-  
judication of the interests of all persons concerned and to  
prevent the multiplicity of pending actions as well as the  
multiplicity of actions that might yet be filed by said persons  
representing the foregoing Levee and Drainage Districts,  
your petitioner respectfully prays that the following persons  
may be required to appear in said action as follows, to-wit:  
Grady Miller, as receiver for the Southeast Arkansas Levee  
District, in his official capacity; Alex H. Rowell and William  
R. Humphrey, receivers of the Cypress Creek Drainage Dis-  
trict, in their representative capacity; The Mercantile-  
Commerce Bank and Trust Company and the Mercantile-  
Commerce National Bank of St. Louis, as trustees for cer-  
tain disclosed and undisclosed bondholders; The St. Louis  
Union Trust Company and Franklin-American Trust Com-  
pany, in their individual and representative capacity, wheth-  
er owners of bonds or as trustees for undisclosed bondhold-  
ers; also such bondholders' committees as have heretofore  
interpleaded in said receivership proceedings the names of  
which your petitioner is now unable to advise the  
31 Court but which petitioner alleges can be ascertained  
by consulting the files of the United States District  
Clerk at Little Rock, Arkansas; that all the interests, rights,



claims and prerogatives of each and every person, firm, or corporation be adjudicated and that each, as aforesaid, shall have its day in Court, and that when this cause is finally determined all rights as affecting these individuals shall be forever foreclosed; and that your petitioner further respectfully prays that an order be entered requiring the foregoing to be joined as plaintiffs in said action and for such other and further relief as to the Court may seem just and proper.

FRED A. ISGRIG,  
United States Attorney for the  
Eastern District of Arkansas.

Endorsed: "Filed April 20, 1936. Sid B. Redding, Clerk."

32 (Order Sustaining Motion of Defendant to Make Additional Parties Plaintiffs, and Sustaining in Part and Overruling in Part of Defendant's Motion to Strike out Portions of Petition.)

In the United States District Court for the Western Division  
of the Eastern Judicial District of Arkansas.

Mrs. Julia Caroline Spokenbarger, Petitioner,  
No. 7984. vs.

The United States of America, Defendant.

Ruling of the Court on Defendant's Motions

- (1) To Make Parties Plaintiff, and,
- (2) To Strike Parts of Plaintiff's Petition.

I.

Defendant's motion to make additional parties plaintiff sustained for the reasons stated in said motion.

II.

Defendant's motion to strike out parts of plaintiff's petition overruled as to 1, 2, 3, 4, 5 (Second), 7, 10, 11, 12, 13, 14, 15 and 17 specifications; and, sustained as to 5 (First), 6, 8, 9 and 16 specifications.

CHAS. B. DAVIS,  
United States District Judge.

Endorsed: "(Filed September 26, 1936.) Sid B. Redding, Clerk."



33 (Protest of Plaintiff to Order of Court Sustaining Motion of Defendant to Make Additional Parties Plaintiff.)

In the United States District Court, Western Division of the Eastern District of Arkansas.

Mrs. Julia Caroline Sponenbarger, Plaintiff,  
No. 7984. vs.  
United States of America, Defendant.

Assignment of Error.

Re: Additional Parties.

Comes the plaintiff, Mrs. Julia Caroline Sponenbarger, protesting the Order of the Court which sustains the defendant's motion to make additional parties plaintiff in this action, and protests that said rule of the Court is erroneous, and against the just right of this plaintiff, for the following reasons:

I.

The plaintiff's alleged cause of action is strictly personal. The cause of action is not in rem, and does not deal with a tract of land. (See Boston Chamber of Commerce vs. City of Boston, 217 U. S. 189, 54 L. Ed. 725, 727.)

II.

The plaintiff has the legal right to state her own cause of action, and the cause of action is only that which is stated in the plaintiff's complaint.

III.

The plaintiff has the right to control her own alleged cause of action, without interference by those made parties by Order of the Court or any other persons or parties.

IV.

If either of the other parties brought into the case by Order of the Court have a cause of action against the defendant, such cause of action is a distinct cause of action, based upon a distinct and different interest, if any, in the land involved, and involves damages which are entirely separate and distinct from the damage which has been sustained by the plaintiff. Entirely different rules for the measure of damages

would be involved on the part of such new parties, in which the plaintiff has no interest, and would lead to interminable complexity and confusion, entirely destroying the control of the plaintiff over her own cause of action.

## V.

The bringing in of the additional parties plaintiff ordered by the Court would involve so many new issues as to make the expense of trial beyond the ability of the plaintiff to discharge, and would unfairly deprive the plaintiff of her right to try the simple issue existing between herself and the defendant at a reasonable cost, amounting to a substantial denial of justice to the plaintiff.

## VI.

The plaintiff has paid and discharged all liens and assessments against her property due Grady Miller as Receiver of the Southeast Arkansas Levee District, in his official capacity; and therefore Grady Miller, as Receiver of the Southeast Arkansas Levee District has sustained no damage because of the plaintiff's cause of action, and is therefore not a proper party plaintiff in this action.

## VII.

The plaintiff has paid and discharged all liens and assessments against her property due Alex H. Rowell and William R. Humphrey as Receivers of the Cypress Creek Drainage District, in their representative capacities; and therefore Alex H. Rowell and William R. Humphrey as Receivers of the Cypress Creek Drainage District have sustained no damage because of the plaintiff's cause of action, and are therefore not proper parties plaintiff in this action.

## VIII.

The plaintiff has paid and discharged all liens and assessments against her property due the Mercantile-Commerce Bank and Trust Company and the Mercantile-Commerce National Bank of St. Louis, as Trustees for certain disclosed and undisclosed bondholders; and therefore the Mercantile-Commerce Bank and Trust Company and the Mercantile-Commerce National Bank of St. Louis, as Trustees for certain disclosed and undisclosed bondholders have sustained no damage because of the plaintiff's cause of action, and are therefore not proper parties plaintiff in this action.

## IX.

35 The plaintiff has paid and discharged all liens and assessments against her property due The St. Louis Union Trust Company and Franklin-American Trust Company, in their individual and representative capacities, whether owners of bonds or as Trustees for undisclosed bondholders; and therefore the St. Louis Union Trust Company

and Franklin-American Trust Company, whether owners of bonds or as Trustees for undisclosed bondholders have sustained no damage because of the plaintiff's cause of action, and are therefore not proper parties plaintiff in this action.

X.

The plaintiff knows of no bondholder's committee which has any legal entity, or the capacity or authority to sue or be sued or to interplead in this action, or who have any interest or legal right of any kind or character in the plaintiff's cause of action.

Wherefore, the premises considered, the plaintiff prays that the Order of the Court naming additional parties plaintiff be rescinded, cancelled and annulled; and that the plaintiff be allowed to proceed with the trial of her own cause of action against the defendant as stated in her original cause.

The plaintiff stands upon her objection, and this Assignment of Error, throughout the further progress of the case and saves her exception to each and every rule of the Court to the contrary.

Respectfully submitted,

MRS. JULIA CAROLINE SPONEN-  
BARGER, Plaintiff.

By Lamar Williamson, As her Attorney.

Endorsed: "Filed Oct. 6, 1936, Sid B. Redding, Clerk."

36 (Appearance and Protest of Grady Miller, as Receiver for Southeast Arkansas Levee District, to Order making him a party Plaintiff).

In the United States District Court, Western Division of the Eastern District of Arkansas.

Mrs. Julia Caroline Sponenbarger, Plaintiff,  
No. 7984 vs.

United States of America, Defendant.

Comes Grady Miller, the duly appointed, qualified and acting Receiver of and for the Southeast Arkansas Levee District, and, pursuant to the Order of this Court filed in the above styled cause September 26, 1936, enters his appearance in this action and submits to the jurisdiction of the Court therein, but under protest, and noting his objections of record, and for cause states:

I.

He, your respondent, elected to prosecute his claim for damages against the United States Government resulting

from the construction work done by the United States under the provisions of the Flood Control Act of May 15, 1928, referred to in the plaintiff's complaint, by his separate action. Therefore, on August 10, 1934, your respondent filed his separate action against the United States in the Court of Claims of the United States of America under the style of "Southeast Arkansas Levee District, a corporation and H. Grady Miller as Receiver thereof, vs. the United States of America, No. 42718," which suit is still pending. Therefore, jurisdiction of the interest of your respondent in the subject matter of the above styled action first attached in the Court of Claims of the United States of America, which Court still controls your respondent's cause of action.

## II.

Your respondent prefers to prosecute his own separate and distinct claim for damages against the United States in his own way, and in his own separate action.

37

## III.

The claim for damages which your respondent desires to assert is a personal claim for damages, and is not an action in rem; and the plaintiff, Mrs. Julia Caroline Sponenbarger, has no interest in your respondent's cause of action, and he has no interest in her cause of action.

## IV.

Your respondent has no desire to assert any control over the plaintiff's cause of action, nor to interfere with her conduct thereof; but, if your respondent is forced to assert his claim in the plaintiff's cause of action, then, for his own protection, he must assume control of the litigation, and deprive the plaintiff of the right to control her own lawsuit.

## V.

Your respondent's claim for damages cannot be properly asserted if he is forced to appear as a party in the innumerable suits of the innumerable separate land owners of the affected area, or lose his right if numerous other land owners have not in apt time filed their separate claims against the United States.

## VI.

The proof of damages which will be involved in your respondent's claim against the United States, and the proof of damage which will be involved in the plaintiff's claim against the United States, are entirely separate and distinct and will rest on entirely different rules and measures of

damage. Undertaking to combine the ascertainment of these different measures of damage growing out of entirely separate and distinct interests in entirely different areas will lead only to confusion, delay, unreasonable expense, and possible denial of justice to one or the other of the parties involved.

## VII.

Had the defendant, the United States, desired to assume the control of the issues involved, it should have instituted condemnation proceedings under the authority of the Flood Control Act of May 15, 1928, in which action it could have joined all parties defendant it might have desired.

38 Wherefore, the premises considered, your respondent prays that he be not involved in the present action, but be permitted to prosecute his own separate action now pending in the Court of Claims of the United States under the control and direction of that Court which holds jurisdiction.

Respectfully submitted,

GRADY MILLER,

As Receiver for the Southeast Arkansas  
Levee District, in His Official Capacity,  
Respondent.

By Joe W. House and Lamar Williamson,  
His Attorneys of Record.

Per Lamar Williamson.

Endorsed: "Filed Oct. 6, 1936, Sid B. Redding, Clerk."

39 (Appearance and Protest of Alex H. Rowell, et al., as  
Receivers of Cypress Creek Drainage District,  
to Order making them parties Plaintiff.)

In the United States District Court, Western Division of the  
Eastern District of Arkansas.

Mrs. Julia Caroline Sponenbarger, Plaintiff  
vs. No. 7984

United States of America, Defendant.

Come Alex H. Rowell and William R. Humphrey, the duly appointed, qualified and acting Receivers of and for the Cypress Creek Drainage District, in their representative capacities, and, pursuant to the Order of this Court filed in the above styled cause September 26, 1936, enter their appearance in this action and submit to the jurisdiction of the



Court therein, but under protest, and noting their objections of record, and for cause state:

I. They, your Respondents, elected to prosecute their claim for damages against the United States Government resulting from the construction work done by the United States under the provisions of the Flood Control Act of May 15, 1928, referred to in the plaintiff's complaint, by their separate action. Therefore, on August 10, 1934, your Respondents filed their separate action against the United States in the Court of Claims of the United States of America under the style of "Cypress Creek Drainage District, a corporation, and A. H. Rowell and William R. Humphrey, as Receivers thereof, et al,—Petitioners and Claimants, vs. The United States of America—Defendant, No. 42719," which suit is still pending. Therefore, jurisdiction of the interest of your Respondents in the subject matter of the above styled action first attached in the Court of Claims of the United States of America, which Court still controls your Respondents' cause of action.

II. Your Respondents prefer to prosecute their own separate and distinct claim for damages against the United States in their own way, and in their own separate action.

III. The claim for damages which your Respondents desire to assert is a personal claim for damages, and is not an action in rem; and the plaintiff, Mrs. Julia Caroline  
40 Sponenbarger has no interest in your Respondents' cause of action, and they have no interest in her cause of action.

IV. Your Respondents have no desire to assert any control over the plaintiff's cause of action, nor to interfere with her conduct thereof; but, if your respondents are forced to assert their claim in the plaintiff's cause of action, then, for their own protection, they must assume control of the litigation, and deprive the plaintiff of the right to control her own lawsuit.

V. Your Respondents' claim for damages cannot be properly asserted if they are forced to appear as a party in the innumerable suits of the innumerable separate land owners of the affected area, or lose their right if numerous other land-owners have not in apt time filed their separate claims against the United States.

VI. The proof of damages which will be involved in your Respondents' claim against the United States, and the proof of damage which will be involved in the plaintiff's claim

against the United States, are entirely separate and distinct and will rest on entirely different rules and measures of damage. Undertaking to combine the ascertainment of these different measures of damage growing out of entirely separate and distinct interests in entirely different areas will lead only to confusion, delay, unreasonable expense, and possible denial of justice to one or the other of the parties involved.

VII. Had the defendant, the United States, desired to assume the control of the issues involved, it should have instituted condemnation proceedings under the authority of the Flood Control Act of May 15, 1928, in which action it could have joined all parties defendant it might have desired.

Wherefore, the premises considered, your Respondents pray that they be not involved in the present action, but be permitted to prosecute their own separate action now  
41 pending in the Court of Claims of the United States under the control and direction of that Court which holds jurisdiction.

Respectfully submitted,

ALEX H. ROWELL AND WILLIAM R.  
HUMPHREY As Receivers of the Cypress Creek Drainage District, in Their  
Respective Capacities . . . Respondents.

By Lamar Williamson, Hendrix Rowell  
and DeWitt Poe, Their Attorneys of  
Record,

Per Lamar Williamson.

Endorsed: "Filed Oct. 6, 1936, Sid B. Redding, Clerk."

42 Entry of Appearance and Answer of Mercantile-  
Commerce Bank and Trust Company and  
Mercantile-Commerce National Bank in St.  
Louis.

In the United States District Court Eastern District of Arkansas, Western Division.

Julia Caroline Sponenbarger, Plaintiff  
No. 7984 vs.

United States of America, Defendant.

Come now Mercantile-Commerce Bank and Trust Company and Mercantile-Commerce National Bank in St. Louis and enter their appearance in the above entitled cause pursuant

to motion of the United States of America, the defendant therein, that they be made parties and answer as follows:

1. Mercantile-Commerce Bank and Trust Company is a corporation organized and existing under and by virtue of the laws of the State of Missouri with its principal place of business and post office address in the City of St. Louis in said State, and is successor by consolidation of Mercantile Trust Company and is authorized to be and is actually engaged in the business of accepting and executing trusts, and files this answer as Trustee under a pledge agreement executed by the Southeast Arkansas Levee District securing an issue of bonds of said District dated October 1, 1919, aggregating \$600,000.00 principal amount, hereinafter more particularly referred to; and as trustee under a pledge agreement executed by said District securing an issue of bonds of said District dated March 1, 1921, aggregating \$400,000.00 principal amount, hereinafter more particularly referred to; and as trustee under a pledge agreement executed by said District securing an issue of bonds of said District dated July 1, 1926, aggregating \$100,000.00 principal amount, hereinafter more particularly referred to; and as trustee under a pledge agreement executed by said District securing an issue of bonds of said District dated January 1, 1927, aggregating \$350,000.00 principal amount, hereinafter more particularly referred to.

2. Mercantile-Commerce National Bank in St. Louis is a corporation organized and existing under and by virtue of the laws of the United States of America, with its principal place of business and post-office address in the City of St. Louis, in the State of Missouri, and was formerly known as the National Bank of Commerce in St. Louis, and is authorized to and actually engaged in the business of accepting and executing trusts, and files this answer as Trustee under a pledge agreement executed by the Southeast Arkansas Levee District, securing an issue of bonds of said District, dated June 1, 1923, aggregating \$300,000.00 principal amount, hereinafter more particularly referred to, and as Trustee under a pledge agreement executed by said District securing an issue of bonds of said District dated November 1, 1924, aggregating \$300,000.00 principal amount, hereinafter more particularly referred to.

3. Southeast Arkansas Levee District is a quasi-municipal corporation created by Act No. 83 of the General Assembly of the State of Arkansas, approved February 14, 1917; as

amended by Act No. 93 of the General Assembly of the State of Arkansas, approved February 19, 1919; as amended by Act No. 487 of the General Assembly of the State of Arkansas, approved March 26, 1921; as amended by Act No. 139 of the General Assembly of the State of Arkansas, approved February 19, 1923.

4. Section 1 of the creative Act (Act No. 83 of the Arkansas General Assembly for the year 1917) provides, in part, that all that part of the State of Arkansas embraced and included in the boundaries of the Linwood and Auburn

44 Levee District, in Lincoln County and in Desha County, the Red Fork Levee District, the Desha Levee District, and the Chicot Levee District, subject to overflow and that had paid levee taxes for the past five years, was created into one levee district to be known as the "Southeast Arkansas Levee District," which territory roughly embraces all of Lincoln County, Arkansas, east of the Missouri Pacific Railroad Company's main line track, and all of Desha County and Chicot County in the State of Arkansas lying east of Bayou Bartholomew, all being within the area of the Boeuf River overflow Basin hereinafter referred to. The land described in plaintiff's petition is in said District.

5. Section 2 of said Act 83 creating the Southeast Arkansas Levee District provides that the object of said Act was for the protection of the people, their land and personal property, railroads, tramroads, telephone, telegraph and electric/light and power lines, and all other property, from the overflow waters of the Mississippi and Arkansas Rivers by a system of levee building, constructing and enlarging and maintaining the same along the banks of the Mississippi River and as far up and along the banks of the Arkansas River as is necessary to get the relief sought by said Act. It was further provided in said Section that in order to attain that object the said Southeast Arkansas Levee District should have such powers as were necessary to carry out the scheme of protection sought to be accomplished, in cooperation with the Mississippi River Commission and the Tensas Basin Levee Board of Louisiana.

6. It was further provided by Section 7 of said Act 83 that for the purpose of building, repairing and maintaining the line of levees contemplated, and for the purpose of carrying into effect the objects sought, it was declared and ascertained by the General Assembly of the State of Arkansas that the improvement contemplated was for the general pro-



45      tection within the territory of the District of all the people, their land, railroads, tramroads, telephone, telegraph, electric light and power lines, and all other property of every description from the overflow waters of the Mississippi and Arkansas Rivers and that benefits are incident to such protection; Section 8 of said Act 83 as amended by said Act 93 and as amended by said Act 139 provides in part that it was thereby ascertained and declared that all the real estate subject to overflow in said district, except the real estate included in the limits of any town in said district, was benefited annually to the extent of 30 cents per acre; there was thereby levied and assessed against each and every acre of such real estate in the district a tax of 30 cents per year; that each and all of the real estate subject to overflow included in the limits of any town in said levee district was benefited annually not less than 30 mills on the dollar of the assessed value thereof; there was thereby levied and assessed against each and all of said real estate within said district within the limits of any town, annually, a tax of 30 mills on the dollar of the assessed value thereof; that upon each and every railroad there was declared a benefit annually to the extent of \$250.00 per mile; there was thereby levied and assessed against each such railroad, its right of way subject to overflow, an annual tax of \$250.00 per mile; that there was declared a benefit to every telephone, telegraph, electric light and power line in the territory subject to overflow a benefit annually of not less than 30 mills on the assessed value thereof; there was thereby levied and assessed an annual tax of 30 mills on the assessed value thereof.

7. It was further provided by Section 11 of said Act creating the Southeast Arkansas Levee District that for the purpose of construction, maintaining and repairing the levees heretofore mentioned, said District should have the power to borrow money from time to time and to issue the necessary evidences of indebtedness for that purpose, including the re-  
 46      funding of all of the obligations incurred by the original districts hereinbefore named which were merged into the Southeast Arkansas Levee District.

8. Pursuant to said authority, in order to accomplish the purposes of its creation, and in order to raise funds with which to construct the levees authorized by the General Assembly of the State of Arkansas, the Southeast Arkansas Levee District did from time to time borrow moneys and issue therefor its interest-bearing evidences of indebtedness in the aggregate sum of \$2,957,500.00.



9. In order to repay said bonded indebtedness the General Assembly of the State of Arkansas has assessed an annual tax of 30 cents per acre on all rural lands within the boundaries of said District, and an annual tax of 30 mills on the dollar of the assessed valuation of all real property in towns and cities within the District, \$250.00 on each mile of railroad subject to overflow, and 30 mills on the dollar of all assessed valuations on all other property taxable within the District.

10. By proper legislation, this annual tax, levied for the purpose of paying said bond issues, is made a lien against all of the property so taxed.

11. Section 10 of said Act 83 provided that said taxes therein levied should constitute a lien on all of the property in said District against which they were assessed. Section 11 of said Act 83 provided in part that the Board of Directors of said District was required to set aside annually from the first revenue collected from any source whatsoever sufficient sums to pay the interest and maturities for the year on all of the outstanding bonds that might become due in such year, and for the purpose of securing said bonds and interest a lien was thereby charged on all of the lands, lots, railroad embankments and tramways, and all other property in said District subject to levee tax paramount to all other liens.

12. After the passage of the Flood Control Act by the Congress of the United States, hereinafter more particularly described, and for reasons hereinafter alleged, property owners within the district, realizing that their lands and property had been so damaged by said Act of Congress as to be worthless, or their values seriously impaired, ceased paying annual taxes to such an extent as to bring about defaults in all of the outstanding bonded indebtedness of the District, causing the inability of the District to meet the annual maturities of principal and interest of said indebtedness.

13. Whereupon, at the suit of the Trustees for the bondholders of said bonded indebtedness of said District, in the case of Mercantile-Commerce Bank and Trust Company, Trustee, Mercantile-Commerce National Bank in St. Louis, Trustee, plaintiffs, vs. Southeast Arkansas Levee District, defendant, with St. Louis Union Trust Company, Trustee, as Intervener, being all of the Trustees for all of the bond issues involved, the plaintiff, H. Grady Miller, was appointed by the United States District Court for the Western Division of the Eastern District of Arkansas, as Receiver.

14. Pursuant to said Act 83, as amended by Act 93 of the General Assembly of the State of Arkansas, approved February 19, 1919, said Southeast Arkansas Levee District duly issued its bonds dated October 1, 1919, aggregating \$600,000.00, of which there are now outstanding and unpaid bonds aggregating \$490,000.00 principal amount; said bonds are due and payable serially, September 1, 1931 to September 1, 1944, inclusive, bearing interest at the rate of 5 per cent per annum, payable March 1st and September 1st of each year, evidenced by coupons thereto attached; said District has failed and neglected to pay the bonds maturing September 1, 1931, September 1, 1932, and September 1, 1933, September 1, 1934, September 1, 1935, and September 1, 1936, and has failed and neglected to pay the interest on all of the  
48 bonds of said issue due and payable September 1, 1931, and subsequent thereto.

15. To secure the payment of said bonds, said Southeast Arkansas Levee District pledged, mortgaged and set over unto the Mercantile Trust Company, now Mercantile-Commerce Bank and Trust Company, of the City of St. Louis, as Trustee, the property and revenues of said District, including all uncollected assessments assessed by said Act 93 on all of the real estate, railroads and tramways in said district; together with all assessments that might thereafter be levied thereon; by said pledge agreement it was the intention to give to the bondholders a lien upon all the taxes levied and to be levied, and upon the entire revenues of the District from whatever source derived, which said pledge agreement was duly recorded as required by law; said bonds reciting that they were payable out of the proceeds of taxes theretofore legally levied upon the real property, railroads and tramroads embraced within said District and benefited by said improvements, and that same are secured by a prior tax lien on all of said real property, railroads and tramroads, \* \* \* and that for the faithful performance of all covenants, recitals and stipulations therein contained, for the proper application of the proceeds of the taxes theretofore or thereafter levied, and for the faithful performance in apt time and manner of every official act required and necessary to provide for the prompt payment of principal and interest of said bonds as they mature, the full faith, credit and resources of said Levee District were thereby irrevocably pledged.

16. Pursuant to said Act No. 83, as amended by said Act No. 93, of the General Assembly of the State of Arkansas, approved February 19, 1919, said Southeast Arkansas Levee District duly issued its bonds dated March 1, 1921, aggregating \$400,000.00 principal amount, all of which are outstand-

ing and unpaid, maturing serially September 1, 1938, to September 1, 1945, inclusive, bearing interest at the rate of 6 per cent per annum, payable semiannually March 1st and September 1st of each year; said District has failed and neglected to pay the interest due on all of said bonds, maturing September 1, 1931, and subsequent thereto.

17. To secure the payment of said bonds, said Southeast Arkansas Levee District pledged, mortgaged and set over unto the Mercantile Trust Company, now Mercantile-Commerce Bank and Trust Company, of the City of St. Louis, as Trustee, the property and revenues of said District, including all uncollected assessments assessed by said Act 93 on all of the real estate, railroads and tramways in said District, together with all assessments that might thereafter be levied thereon; by said pledge agreement it was the intention to give to the bondholders a lien upon all the taxes levied and to be levied, and upon the entire revenues of the District from whatever source derived, which said pledge agreement was duly recorded as required by law; said bonds reciting that they were payable out of the proceeds of taxes theretofore legally levied upon the real property, railroads and tramroads embraced within said District and benefited by said improvements, and that same are secured by a prior tax lien on all of said real property, railroads and tramroads, \* \* \* and that for the faithful performance of all covenants, recitals and stipulations therein contained, for the proper application of the proceeds of the taxes theretofore or thereafter levied, and for the faithful performance in apt time and manner of every official act required and necessary to provide for the prompt payment of principal and interest of said bonds as they mature, the full faith, credit and resources of said Levee District were thereby irrevocably pledged.

18. Pursuant to said Act 83, as amended by said Act 93, by said Act 487, and by said Act 139 of the General Assembly of the State of Arkansas, approved February 19, 1923, said Southeast Arkansas Levee District duly issued its bonds dated July 1, 1926, aggregating \$100,000.00 of which there are now outstanding and unpaid bonds aggregating the whole of said \$100,000.00 amount; said bonds are due and payable serially July 1, 1936, to July 1, 1956, inclusive, bearing interest at the rate of 5% per annum payable January 1st and July 1st of each year, evidenced by coupons thereto attached; said District has failed and neglected to pay the bonds maturing July 1, 1936 and has failed and neglected to pay the interest on all of the bonds of said issue due and payable January 1, 1932, and subsequent thereto.

19. To secure the payment of said bonds said Southeast Arkansas Levee District pledged, mortgaged and set over unto the Liberty Central Trust Company of the City of St. Louis, State of Missouri, as Trustee, all of the taxes authorized to be collected under the Acts of the Legislature upon the said subject recited in said bonds and all benefits assessed in said District; by said pledge agreement it was the intention to give to the bondholders a lien upon all the taxes levied and to be levied and upon the entire revenues of the District from whatever source derived, which said pledge agreement was duly recorded as required by law; said bonds reciting that they are secured by a lien upon all lands, lots railroad embankments and tramways, and all other property in said District, subject to a levee tax, and that for the faithful performance of all covenants, recitals and stipulations in said bonds contained, for the proper application of the proceeds of the taxes theretofore or thereafter levied and for the faithful performance in apt time and manner of each official act necessary to provide for the prompt payment of principal and interest of the bonds as they mature the full faith, credit, taxes and all benefits assessed in said District are thereby irrevocably pledged.

20. Pursuant to the terms of said pledge agreement said Liberty Central Bank & Trust Company duly resigned as Trustee in said pledge agreement and Mercantile-Commerce Bank and Trust Company was duly appointed and qualified and is now duly acting as Trustee in said pledge agreement with all the powers and authority as though it had been the Trustee originally named in said pledge agreement.

21. Pursuant to said Act 83, as amended by said Act 93, as amended by said Act 487 and by said Act 139 of the General Assembly of the State of Arkansas, approved February 19, 1923, said Southeast Arkansas Levee District duly issued its bonds dated January 1, 1927, aggregating \$350,000.00 principal amount, of which there are outstanding and unpaid bonds aggregating \$334,000.00 principal amount maturing serially September 1, 1931, to September 1, 1945, bearing interest at the rate of 5% per annum, payable semi-annually March 1st and September 1st of each year; said District has failed and neglected to pay said bonds maturing September 1, 1931, September 1, 1932, September 1, 1933, September 1, 1934, September 1, 1935 and September 1, 1936, aggregating \$60,000.00 principal amount and to pay interest due on all said bonds maturing September 1, 1931, and subsequent thereto.



22. To secure the payment of said bonds said Southeast Arkansas Levee District pledged, assigned, transferred, mortgaged and set over to the St. Louis Union Trust Company of St. Louis, Missouri, as Trustee, the property and revenues of the District including all its revenues of every description derived from taxes theretofore or thereafter levied or collected or from any other source and all uncollected assessments levied by Act No. 139 of the General Assembly of 1923 on the real property, railroads and tramways in said District together with all assessments that might thereafter be levied thereon; by said pledge agreement it was the intention to give to the bondholders a lien upon all the taxes levied and to be levied and upon the entire revenues from the District from whatever source derived, which said pledge agreement was duly recorded as required by law; said bonds reciting that they were payable out of the proceeds of taxes theretofore legally levied upon the real property, railroads and tramroads embraced within said District and benefited by said improvement, and were secured by prior tax lien upon all of said real property, railroads and tramroads \* \* \*, and that for the faithful performance of all covenants, 52 recitals and stipulations therein contained, for the proper application of the proceeds of the taxes theretofore or thereafter levied and for the faithful performance in apt time and manner of every official act required and necessary to provide for the prompt payment of the principal and interest of said bonds as they matured, the full faith, credit and resources of said levee district were thereby irrevocably pledged.

23. Pursuant to the terms of said pledge agreement said St. Louis Union Trust Company duly resigned as Trustee in said pledge agreement and Mercantile-Commerce Bank and Trust Company was duly appointed and qualified and is now duly acting as Trustee in said pledge agreement with all the powers and authority as though it had been the Trustee originally named in said pledge agreement.

24. Pursuant to said Act 83, as amended by said Act 93, as amended by said Act 487, and as amended by said Act 139 of the General Assembly of the State of Arkansas, approved February 19, 1923, said Southeast Arkansas Levee District duly issued its bonds dated June 1, 1923, aggregating \$300,000.00, of which there are now outstanding and unpaid bonds aggregating \$285,000.00 principal amount; said bonds are due and payable serially September 1, 1931, to September 1, 1953, inclusive; bearing interest at the rate of 5½ per cent per



annum, payable March 1st and September 1st of each year, evidenced by coupons thereto attached; said District has failed and neglected to pay the bonds maturing September 1, 1931, September 1, 1932, September 1, 1933, September 1, 1934, September 1, 1935, and September 1, 1936, aggregating \$39,000.00 principal amount, and has failed and neglected to pay the interest on all of the bonds of said issue due and payable September 1, 1931, and subsequent thereto.

25. To secure the payment of said bonds, said Southeast Arkansas Levee District pledged, mortgaged and set over unto the National Bank of Commerce in St. Louis, now Mercantile-Commerce National Bank in St. Louis, of the City of St. Louis, as Trustee, the property and revenues of said district, including all uncollected assessments assessed by said Act 139 on all of the real estate, railroads and tramways in said district, together with all assessments that might thereafter be levied thereon; by said pledge agreement it was the intention to give to the bondholders a lien upon all the taxes levied and to be levied, and upon the entire revenues of the district from whatever source derived, which said pledge agreement was duly recorded as required by law; said bonds reciting that they were payable out of the proceeds of taxes theretofore legally levied upon the real property, railroads, and tramroads embraced within said District and [benefit] by said improvement, and that same were secured by a prior tax lien on all of said real property, railroads, and tramroads \* \* \* and that for the faithful performance of all covenants, recitals and stipulations therein contained, for the proper application of the proceeds of the taxes theretofore or thereafter levied, and for the faithful performance in apt time and manner of every official act required and necessary to provide for the prompt payment of principal and interest of said bonds as they matured, the full faith, credit and resources of said Levee District were thereby irrevocably pledged.

26. Pursuant to said Act 83, as amended by said Act 93, as amended by said Act 487, as amended by said Act 139, of the General Assembly of the State of Arkansas, approved February 19, 1923, said Southeast Arkansas Levee District duly issued its bonds dated November 1, 1924, in the aggregate principal amount of \$300,000.00, of which are now outstanding and unpaid \$282,000.00, maturing serially September 1, 1931, to September 1, 1950, inclusive, bearing interest at the rate of 5 per cent per annum, payable semiannually March 1st and September 1st of each year, evidenced by coupons thereto attached; said District has failed and neglected

to pay the bonds maturing September 1, 1931, September 1, 1932, September 1, 1933, September 1, 1934, September 1, 1935 and September 1, 1936, and has failed and neglected to pay the interest on all said bonds, maturing September 1, 1931, and subsequent thereto.

27. To secure the payment of said bonds, said Southeast Arkansas Levee District pledged, mortgaged and set over unto the National Bank of Commerce in St. Louis, now Mercantile-Commerce National Bank in St. Louis, of the City of St. Louis, as Trustee, the property and revenues of said District, including all uncollected assessments assessed by said Act 139 on all of the real estate, railroads and tramways in said District, together with all assessments that might thereafter be levied thereon; by said pledge agreement it was the intention to give to the bondholders a lien upon all the taxes levied and to be levied and upon the entire revenues of the District from whatever source derived, which said pledge agreement was duly recorded as required by law; said bonds reciting that they were payable out of the proceeds of taxes theretofore legally levied upon the real property, railroads and tramroads embraced within said District and benefited by said improvements, and that same are secured by a prior tax lien on all of said real property, railroads and tramroads \* \* \* and that for the faithful performance of all covenants, recitals and stipulations therein contained, for the proper application of the proceeds of the taxes theretofore or thereafter levied, and for the faithful performance in apt time and manner of every official act required and necessary to provide for the prompt payment of principal and interest of said bonds as they mature, the full faith, credit and resources of said Levee District were thereby irrevocably pledged.

28. By an "Act for the Control of Floods on the Mississippi River and its Tributaries, and For Other Purposes," approved May 15, 1928, hereinafter called the "Flood Control Act," the United States adopted, and enacted into law, a project for the flood control of the Mississippi River in its alluvial valley, and for its improvement from the Head of Passes to Cape Girardeau, Missouri, in accordance with the engineering plan set forth and recommended in the report submitted by the Chief of Engineers to the Secretary of War, dated December 1, 1937, and printed in House Document No. 90, Seventieth Congress, First Session, which engineering plan is commonly called the "Jadwin Plan." The Act provides for raising the levees of the Mississippi River generally three feet, for improving the carrying capacity of the main channel of the River by revet-

ment work, and for limiting the flood waters in this channel to its safe capacity through the provision of specific diversion channels. Among these is the Boeuf Floodway, which will carry excess flood waters from a point below the mouth of the Arkansas River across and over a large portion of the area constituting the Southeast Arkansas Levee District, completely traversing said Levee District to and through the Boeuf River Basin into the backwater area at the mouth of the Red River in the State of Louisiana. The Plan leaves the section of the Mississippi River Levee running from approximately the mouth of Cypress Creek, in Desha County, Arkansas, south to approximately Luna Landing, in Chicot County, Arkansas (being the levee which constitutes an important part in the eastern protection boundaries of said Southeast Arkansas Levee District), known as the "fuse-plug levee," at its height on the date of the passage of the Act; but as the levees elsewhere have been, and are to be, raised three and one-half feet and materially strengthened, preventing overflow at other points, the volume of water passing into this diversion channel has been, and will be greatly increased.

29. The maximum previous overflow of water into the Boeuf Basin occurred in 1927 and was estimated at 450,000 cubic feet per second. Said Flood Control Act involves an intentional, additional, occasional flooding, damaging and destroying the lands and property within said District, title to which has been acquired by said District, and of lands and property on which said District holds said statutory lien as its sole and only income for the purpose of discharging its

56 bonded indebtedness, as the direct consequence of the constructions of the entire project (Jadwin Plan) by the Government to relieve the channel of the River in times of high water, all of which was contemplated by the Congress when enacting said Flood Control Act, and constitutes a taking of property for public use for which the Government of the United States is liable to Mercantile-Commerce Bank and Trust Company and Mercantile-Commerce National Bank, as upon an implied contract, for such compensation as might have been awarded Mercantile-Commerce Bank and Trust Company and Mercantile-Commerce National Bank in St. Louis had condemnation proceedings been instituted by the Government of the United States.

30. Said Flood Control Act provided that a Board to consist of the Chief of Engineers, the President of the Mississippi River Commission, and a civil engineer chosen from civil life, be appointed by the President of the United States,

by and with the consent and advice of the Senate, which Board was authorized and directed to consider the engineering differences between the adopted project (Jadwin Plan) and the plans recommended by the Mississippi River Commission in its special report dated November 28, 1927, and to recommend to the President such action as such Board might deem necessary to be taken in respect to such engineering differences, and it was provided further that the decision of the President upon all recommendations or questions submitted to him by such Board should be followed in carrying out the project adopted. There were very substantial differences in the plan of the Mississippi River Commission for the Boeuf River Floodway diversion as it affected the Southeast Arkansas Levee District and its property, and the plan of the Army Engineers (Jadwin Plan), so that said district could not know just how its property was to be affected until those engineering differences were adjusted and settled.

31. Said Special Board created by Section 1 of said Flood Control Act reported to the President of the United States on August 8, 1928, recommending the engineering of the Jadwin Plan (the adopted project), and on August 13, 1928, the President of the United States approved "the policy and method of dealing with the problem set out in the report, dated August 1, 1928", of said Special Board, and the Jadwin Plan thereby, on August 13, 1928, for the first time became definite, certain and fixed as a matter of law, insofar as it affects the Southeast Arkansas Levee District and the property herein involved. Work on the project by the United States Government began immediately on or after August 13, 1928, funds for the purpose being available, and construction work on the plan of flood control is now approximately 70 per cent complete.

32. The project of flood control as adopted by the Flood Control Act of May 15, 1928, for which the Government of the United States assumed responsibility, differed from the old flood control system of levees, and levees only, by the deliberate creation of certain diversion channels to be sacrificed for the protection of the balance of the alluvial valley of the Mississippi River. The then Chief of Engineers, in his report to the Secretary of War, which was submitted by the Secretary of War to the Congress in connection with the Jadwin Plan, which was enacted into law by said Flood Control Act, states that:

"The recommended plan (Jadwin Plan) fundamentally differs from the present project in that it limits the amount of flood water carried in the main river to its safe capacity, and



sends the surplus water through lateral floodways. Its essential features and their functions are:

"Floodways from Cairo to New Madrid, from the Arkansas River through the Tensas Basin to the Red River, and from the Red through the Atchafalaya Basin to the Gulf of Mexico. These will relieve the main channel of the water it cannot carry and lower the floods to stages at which levees can carry them." (Document No. 90, House of Representatives, 70th Congress, 1st Session, pp. 304.)

33. The Jadwin Plan as enacted into law by said Flood Control Act further describes the plan for flood control as it affects the property described in plaintiff's petition, which is protected only by the "fuse-plug" or "safety-plug" section of the levee immediately below the mouth of Cypress Creek in Desha County, Arkansas, as follows:

58 "16. From the mouth of the Arkansas (River) to the Old River, at the mouth of the Red (River), extreme floods cannot be carried between levees of the Mississippi (River) without dangerous increase in their heights. A floodway for excess floods is provided down the Boeuf River, on the west side of the River. Excess water cannot be carried through the section on the east side, since it would be forced back into the main river by the highlands on the east bank below Vicksburg and have to be carried thence for 160 miles between the main river levees to the mouth of the Red River. The entrance to the floodway is closed by a safety-plug section of the levee, at present grade, which is located at Cypress Creek near the mouth of the Arkansas. To insure their safety until this section opens, the levees of the Mississippi (River), from the Arkansas to the Red, will be raised about 3 feet. To prevent flood waters from entering the Tensas Basin, except into the floodway during high floods, the levees on the south side of the Arkansas will be strengthened and raised about 3 feet as far upstream as necessary.

"17. The Section at the head of the floodway will protect the land within the floodway levees against any flood up to one of the magnitude of the 1922 flood. A flood of the magnitude somewhere between that of 1922 and of 1927, will break it, turning the excess water down the floodway, which will carry it safely to the backwater area at the mouth of the Red River." (Document No. 90, p. 6.)

34. Said Jadwin Plan, enacted into law by said Flood Control Act, further recites, and it is the fact that:



"The confinement of flood flows by levees has substantially raised the flood heights." (Document No. 90, p. 19.)

"96. The confinement of the Mississippi River within levees and the great development of drainage systems in recent years have raised flood stages materially and this raising has exceeded estimates made in the past. Were it attempted to hold the water within the present levee lines by raising them, river stages are possible as much as \* \* \* 14 feet above the present levee grade at Arkansas City, \* \* \* The levees now have an average height of about 18 feet. The practical means to meet this situation is to spill the water out of the main leveed channel at selected points when the stages reach the danger point.

"97. The water within the river channel does no damage whatever and it should be kept within the channel as long as possible. The excess must be spilled through safety valves when the volume exceeds the safety capacity of the river. These safety valves consist of one controlled spillway, several relief or fuse-plug levees at present grade and one levee of reduced height, all emptying into natural floodways, wholly or partially leveed." (Document No. 90, p. 23.)

59. "The levees generally will be raised about 3 feet, so that the selected, weaker relief levees will be at about the elevation of the present levee top and will surely serve their purpose." (Document No. 90, p. 24.)

"118. To insure that excess water will leave the main river, a fuse-plug section of the levee in the vicinity of Cypress Creek must be kept at its present strength and at its present grade, viz., 3 feet below the new levee grade. This relatively weak section will be long enough to discharge the greatest predicted possible excess water over and above the capacity of the leveed river below. In order to limit the land in the Tensas Basin overflowed by it, levees will be constructed on each side of the Boeuf River Bottom, where natural ridges do not serve, from the Cypress Creek levee to back-water in the lower Tensas Basin. Arkansas City is to be enclosed with a levee. This floodway will be wide enough to carry the water without clearing and without maintenance except for the side levees." (Document No. 90, page 28.)

35. These side levees or guide levees have not yet been constructed by the Government, but the property described in plaintiff's petition is in the floodway whether said floodway be controlled or uncontrolled, as at the present, and is subject to inundation and destruction whenever the fuse-plug

levee gives way to protect the balance of the alluvial valley of the Mississippi River.

"Due to the increase in flood height by reason of levee construction and drainage, it has been estimated that a stage over the present top at Cypress Creek might occur in the long run about once in twelve years." (Document No. 90, p. 28.)

"121. The remainder of the alluvial valley on each side of this stretch of the river, barring accident, will have complete protection from all possible floods." (House Document No. 90, p. 28.)

"The draw down from Cypress Creek relief levee into the Boeuf River diversion below makes it possible to protect the lower part of this section of the river from superfloods without excessive levee raising. \* \* \* the average amount that levees are to be raised throughout is approximately 3-1/2 feet above the present adopted grade." (Document No. 90, pp. 29-30.)

Section 4 of the Flood Control Act provides:

"Sec. 4. The United States shall provide flowage rights for additional destructive flood waters that will pass by reason of diversion from the main channel of the Mississippi River \* \* \*."

36. The waters that will flow into the Boeuf Floodway or diversion channel will all be diverted from the main channel of the Mississippi River at a place and in a manner which has never been true before, but which subjects the property described in plaintiff's petition to inundation, damage and destruction whenever a flood stage is reached in the Mississippi River sufficient to overtop or wash away the fuse-plug levee hereinbefore mentioned. The main levees of the Mississippi River have been strengthened and raised so as to now insure the flooding of the property described in plaintiff's petition at predetermined stages of the River. The purpose of leaving the fuse-plug levee hereinbefore mentioned (the only protection of the land described in plaintiff's petition) is solely for the purpose of having the water break over same at flood tide and flood this diversion channel or floodway in which the land described in plaintiff's petition is situated. It is an uncontrollable spillway. There is no provision of law for rebuilding the fuse-plug levee when it washes out, but the land described in plaintiff's petition will then be left free to the ravages of the escaping waters of the Mississippi River with no protection whatever.

37. Pursuant to the provisions of said Flood Control Act, from Helena South the levees on the west bank of the Mississippi River will be maintained at sufficient height to hold all of the flood waters which reach this point from the entire basin of the upper Mississippi River and all of its tributaries, carrying all of this water within the levees to a point about 12 miles distant from a similar levee on the south bank of the Arkansas River. Through this gap the White River passes into the Mississippi River about midway between the lower end of the levee on the west bank of the Mississippi River above mentioned, and the mouth of the Arkansas River. Lying between these levee ends to the north and west of the 12-mile gap is located a pool or basin for backwater some twelve hundred square miles in area into which will  
 61 be poured all of the waters of the White River and its watershed, as well as the overflow on the north bank of the Arkansas River for a distance upstream to the locality of Pine Bluff, Arkansas.

38. It is not contemplated under the present law that any levee will be built along this stretch of the River. When this basin of twelve hundred square miles is filled, its outlet, together with all water coming down the White and Arkansas Rivers, will be discharged through the 12-mile gap above described.

39. This combined volume will be added to that in the main stream of the Mississippi River, consisting both of its own water brought down in its own channel from Cairo, Illinois, and also the quantity of water which will have been returned into the Mississippi River, under the present law, from the St. Francis River north of Helena; then for a few miles the comparatively narrow channel of the main levees of the Mississippi River will carry this enormous volume of concentrated flood water until it reaches, and is hurled against, the fuse-plug levee at the head of the Boeuf River Basin hereinbefore referred to, a comparatively short distance from the land described in plaintiff's petition. The "fuse-plug" levee is so named because in due course during flood stages of the Mississippi River this stretch of the levee will break and be washed out when the River reaches the predetermined height fixed by the Army Engineers, in similar fashion to what happens when a current of electricity attains a designed voltage sufficient to blow out the fuse in electrical machinery. It is contemplated that this concentration of flood water upon the fuse-plug levee will overtop the fuse-plug levee and cause a crevasse through the fuse plug levee which will gradually widen to include the whole of

twenty or more miles of said relief levee if the condition of the Mississippi River so requires for the safety of the remainder of its alluvial valley.

62 40. The causes of damage to land described in plaintiff's petition, and the physical conditions involved in this litigation resulting in such damage, are identical to those involved and recited in the decision in the case of Patrick J. Hurley vs. F. Foster Kincaid, Sr., 285 U. S. 95, 525 S. Ct. 267, 76 Law ed. 637, more particularly described in the opinions of the courts in the same case below reported at 49 F. (2d) 768, affirmed 37 F. (2d) 602, except that said lands are located at the very head of the floodway, a comparatively few miles distant from the fuse-plug levee, its only protection. When the fuse-plug levee breaks, the land described in plaintiff's petition will be subjected to the immediate, destructive onrush of water.

41. Prior to the adoption of the Flood Control Act, the Southeast Arkansas Levee District, and all of the property owners interested therein whose property is now protected only by said fuse-plug levee, had, and exercised, their legal right of protecting themselves against inundation by raising the present fuse-plug levee during flood times. This right of defense has been taken from the petitioner, and the owners of the property within said Southeast Arkansas Levee District by the Flood Control Act.

42. Paragraph numbered 120 of the adopted project provides as the key to the entire system of flood control that:

"The United States must have control over the Cypress Creek-levee and keep it at substantially its present strength and present height" (Document No. 90, p. 28).

Paragraph numbered 118 of the adopted project further provides that:

"To insure that excess water will leave the main river, a fuse-plug section of the levee in the vicinity of Cypress Creek must be kept at its present strength and at its present grade, viz., three feet below the new levee grade."

Section 3 of said Flood Control Act further provides:

63 " . . . If in carrying out the purposes of this Act it shall be found that upon any stretch of the banks of the Mississippi River it is impracticable to construct levees, either because such construction is not economically justified, or because such construction would unreasonably restrict the flood channel, and lands in such stretch of the River are subjected to overflow and damage which are not



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now overflowed or damaged by reason of the construction of levees on the opposite banks of the river, it shall be the duty of the Secretary of War and the Chief of Engineers to institute proceedings on behalf of the United States Government to acquire either the absolute ownership of the lands so subjected to overflow and damage or floodage rights over such lands."

43. The levees on the opposite banks of the River from their property have been constructed and raised as hereinbefore described and as directed by law, so that their property is now subject to overflow and damage by the break of the fuse-plug levee within the meaning of this Section of said Flood Control Act, again constituting a taking of its property for which the owners are entitled to just compensation under the provisions of the Act, as well as under the Fifth Amendment to the Constitution of the United States.

44. By the express provision of Section 3 of said Flood Control Act "no local contribution to the project herein adopted is provided." Prior to the adoption of said Flood Control Act, the land described in plaintiff's petition enjoyed equal protection against flood menace, without discrimination, but the primary purpose of the said Flood Control Act is to protect the balance of the alluvial valley of the Mississippi River by sacrificing said property and the property of others within the Bonf River spillway similarly situated. Unless, therefore, owners are compensated for all damages by them sustained as herein alleged, then they will be forced to contribute the entire damages to the project, notwithstanding said provision of the Act to the contrary.

45. The adopted project has destroyed the entire salable value of said lands, and has destroyed the ability of said lands to discharge the tax burden against them due to the said Levee District, and has impaired and practically

64 destroyed the full use and enjoyment of said property for all practical purposes. The result of setting apart this area as a floodway or diversion channel and of preventing the escaping of the flood waters of the Mississippi River elsewhere, and the intentional dedication of this property as a floodway of said Flood Control Act, has subjected the property to flood menace at any and all times. The uncertainty of the safety of persons living upon said property makes it unwise and unsafe to develop said property agriculturally, or to undertake to use said property at any time. The adopted project has had the effect of casting a cloud on the title of said district to the said land and property, and on liens thereon, so that said lands have been deprived of all reasonable market value therefor, and persons cannot be interested in developing said lands into profitable farms, or

to use said lands for any other purpose for which they are fitted, because the Government of the United States has substantially taken possession of the property for a diversion channel or floodway of the Mississippi River, to the damage of Mercantile-Commerce Bank and Trust Company and Mercantile-Commerce National Bank in St. Louis in the amount of the benefits taxed against said land and pledged to them.

46. Notwithstanding the fact that the Fifth Amendment of the Constitution of the United States provides: " \* \* \* nor shall any person \* \* \* be deprived \* \* \* of property without due process of law, nor shall private property be taken for public use without just compensation," and notwithstanding the provision of said Flood Control Act: "That the United States shall provide flowage rights for additional destructive flood waters that will pass by reason of diversion from the main channel of the Mississippi River," and notwithstanding the further provision of said Act that the "Secretary of War may cause proceedings to be instituted for the acquirement by condemnation of any lands, easements or rights of way which, in the opinion of the Secretary of War, and the Chief of Engineers, are needed in carrying out this project, the

65 said proceedings to be instituted in the United States District Court for the District in which the lands, easements or rights of way is located," no condemnation proceedings of any kind has been commenced against said land, nor against any other person for the condemnation of the property now owned by the Southeast Arkansas Levee District, and no compensation of any kind has been paid or offered to the petitioner for the taking or damage of the property herein involved as aforesaid.

Wherefore, the premises considered, Mercantile-Commerce Bank and Trust Company and Mercantile-Commerce National Bank in St. Louis pray judgment against the Government of the United States in the sum of the benefits assessed against the land described in plaintiff's petition and pledged to them, plus interest at the rate of 6 per cent from March 1, 1931, and for all other and further general relief to which the premises and proof may show them entitled.

**MERCANTILE-COMMERCE BANK AND  
TRUST COMPANY,  
MERCANTILE-COMMERCE NATIONAL  
BANK IN ST. LOUIS.**

By Thompson, Mitchell, Thompson and  
Young.

By Fred W. Armstrong.

Endorsed: "Filed Dec. 22, 1936, Sid B. Redding, Clerk."

66 Separate Petition of St. Louis Union Trust Company  
Individually and in Its Own Right and As Trustee for Bondholders in a Pledge Instrument and Mortgage Executed By the Cypress Creek Drainage District.

In the United States District Court, Eastern District of  
(Arkansas, Western Division.

○ Mrs. Julia Caroline Spönenbarger, Plaintiff,  
No. 7984 vs.

The United States of America, Defendant.

Comes the plaintiff, St. Louis Union Trust Company, individually and in its own right and as trustee for bondholders in a pledge instrument and mortgage executed by the Cypress Creek Drainage District in pursuance of the order of the Court requiring it to appear in this action and to plead, answer or demur in this cause, and states that it heretofore filed in the Court of Claims of the United States of America a petition against the defendant for damages to its liens as said trustee on all of the lands embraced in the area of the Cypress Creek Drainage District because of the destruction and damage to said lands by reason of the adoption of the Flood Control Act and the putting into effect of the Jadwin Plan; that the defendant demurred to said petition on the ground that the landowners only were entitled to any damages that may have resulted from the passage of said Act and putting into effect the said Plan; that the demurrer of the defendant was overruled; that the lands of Mrs. Julia Caroline Spönenbarger, the original Plaintiff in this action, are embraced within the area of the Cypress Creek Drainage District, and this plaintiff, therefore, states that it, in its capacity as said Trustee, has an action pending for damages for the destruction and damage to its lien against said Plaintiff's lands.

That it is informed that the aforesaid matters were brought to the attention of this Court prior to the time that the motion of the Defendant requiring this Plaintiff to be made a party plaintiff was granted.

That without prejudice to its cause of action pending in the Court of Claims of the United States of America it files this its Separate Petition in this cause and for its cause of action against the Defendant states:

I.

67 It is the owner of bonds issued by the Cypress Creek Drainage District in the principal amount of \$167,500.00.

## II.

The plaintiff is a corporation organized and existing under and by virtue of the laws of the State of Missouri and as such is authorized to accept and execute trusts.

## III.

The Cypress Creek Drainage District is a quasi-municipal corporation, created and functioning under the provisions of Act No. 110 of the General Assembly of the State of Arkansas, approved March 18, 1911; as amended by Act No. 455 of the General Assembly of the State of Arkansas, approved June 2, 1911; as amended by Act No. 80 of the General Assembly of the State of Arkansas, approved February 25, 1915; as amended by Act No. 454 of the General Assembly of the State of Arkansas, approved March 28, 1919; as amended by Act No. 79 of the Special Acts of the General Assembly of the State of Arkansas, approved February 7, 1920; as amended by Act No. 260 of the General Assembly of the State of Arkansas, approved March 10, 1921.

The area comprising Cypress Creek Drainage District is more particularly described in the Acts of the General Assembly of the State of Arkansas hereinabove referred to, but all lies within the area of the Boeuf River Basin Floodway hereinafter referred to and more particularly described hereafter in connection with an explanation of the effect of the Flood Control Act of the United States upon the rights and property of the Plaintiff herein.

For a good many years the owners of property within the present boundaries of Cypress Creek Drainage District had contributed large sums of money annually for the building of levees along the west bank of the Mississippi River, in order to protect said area from the ravages of the flood waters of the Mississippi River, in which work the United States Government participated and co-operated. A large area of land in the State of Arkansas to the West and North of Cypress Creek, in Desha County, in the State of Arkansas, was drained naturally into the Mississippi River through said Cypress Creek. It became evident that protection against the floods of the Mississippi River to the area of the Cypress Creek Drainage District, would never become successful until the mouth of Cypress Creek was closed by proper  
68 levees, because so long as the mouth of Cypress Creek remained open as a drainage outlet the rising waters of the Mississippi River entered therein, flowed upon Cypress Creek, and from thence overflowed the area of this district.



Therefore, the United States Government, acting through the Bureau of Drainage Investigation of the United States Department of Agriculture, prepared plans and specifications for the present drainage system which has been constructed by the said Cypress Creek Drainage District for the purpose of protecting the territory of said district from floods from the gap in the Mississippi River levee between Jefferson Lake and Cypress Creek; and to provide a complete and thorough system of drainage for surface water, made necessary by the closing of said gap in the levee of the Mississippi River, as is recited in Section 3 of Act No. 80 of the General Assembly of the State of Arkansas, approved February 25, 1915, to which reference is hereby specifically made.

In order to construct the proper levees and drains to insure the proper flood protection and drainage within the territory of this district, it became necessary for said Cypress Creek Drainage District to borrow large sums of money, it having no means whatever of its own. In order to enable said district to borrow the necessary funds, the General Assembly of the State of Arkansas authorized the assessment of benefits against all of the territory of said district, which assessment of benefits is by law declared to be the true amount by which each particular unit of property is increased in value because of the improvement contemplated and made. By the provisions of the Acts aforesaid, the amount of these benefits or betterments were made a lien against each particular unit of property, and the said district was authorized by law to pledge annual installments of these benefits to trustees as security for the payment of all bonds issued by the district. Proper provisions of law were made for the foreclosure by the district of its lien against property which might default in the annual payment of the amounts due as aforesaid.

Under authority of said Acts, for the purpose aforesaid, said Cypress Creek Drainage District borrowed the total sum of \$1,800,000.00, and issued its good and sufficient, valid and legal bonds therefor, to secure which it pledged  
69 all of the benefits or betterments which had been assessed, pursuant to law, against all of its territory, aggregating a total sum of \$5,817,709.40.

After the passage of the Flood Control Act by the Congress of the United States, on May 15, 1928, for the reasons hereinafter more particularly alleged, the property owners within the Cypress Creek Drainage District, realizing that their lands and property had been so damaged and destroyed by said Act of Congress as to be practically worthless, and their values so seriously impaired as not to be worth the



tax burden thereon, and realizing that the assessed benefits due to the Cypress Creek Drainage District had been completely appropriated, taken and destroyed by said Flood Control Act of May 15, 1928, ceased paying the annual tax and installments of benefits to such an extent as to bring about default on the part of the district in all of the outstanding bonded indebtedness of the district, because of the inability of the district to meet its annual maturities of principal and interest on said bonded indebtedness, said district having no other source of income whatever.

Whereupon, on December 31, 1929, the St. Louis Union Trust Company, of St. Louis, Missouri, and the Franklin-American Trust Company, of St. Louis, Missouri, representing and acting for the second, third and fourth issues of bonds of the Cypress Creek Drainage District, filed suit in the United States District Court for the Eastern Division of the Eastern District of Arkansas, against the Cypress Creek Drainage District, praying for the appointment of a Receiver to take charge of all of the affairs of said Cypress Creek Drainage, in which suit, thereafter, M. H. Rorick, as Trustee for the first bond issue of said district, intervened and became a party, so that all of the trustees for each and all of the bond issues of said Cypress Creek Drainage District were, and are, parties to said action in said United States District Court, which is styled, St. Louis Union Trust Company and Franklin-American Trust Company, Plaintiff, v. Cypress Creek Drainage District, Defendant, No. 2336, in Equity.

Whereupon, on January 15, 1930, pursuant to the prayer of the petitioners in said action, said District Court of the United States appointed A. H. Rowell, of Pine Bluff, Arkansas, and William R. Humphrey, of St. Louis, Missouri, as Receivers, with full and complete authority to take possession and complete control of all of the property, assets and rights of every kind and character belonging to the said Cypress Creek Drainage District.

#### IV.

The plaintiff alleges that under said Flood Control Act of Congress the United States adopted, and enacted into law, a project for the flood control of the Mississippi River in its alluvial valley, and for its improvement from the Head of Passes to Cape Girardeau, Missouri, in accordance with the engineering plan set forth and recommended in the report submitted by the Chief of Engineers to the Secretary of War, dated December 1, 1927, and printed in House Document No.

90, 70th Congress, 1st Session, which engineering plan is commonly called the "Jadwin Plan." The Act provides for raising the levees of the Mississippi River generally three feet, for improving the carrying capacity of the main channel to its safe capacity through the provision of specified diversions channels. Among these is the Boeuf River Basin Floodway which will carry excess flood waters from a point below the mouth of the Arkansas River across and over a large portion of the area constituting the Cypress Creek Drainage District, completely traversing said Drainage District to and through the Boeuf River Basin into the back-water area at the mouth of the Red River in the State of Louisiana. The plan leaves the section of the Mississippi River Levee running from approximately the mouth of Cypress Creek in Desha County, Arkansas, south to approximately Luna Landing in Chicot County, Arkansas (being the levee which constitutes an important sector in the eastern protection boundary of said Cypress Creek Drainage District), known as the "fuse-plug levee," at its height on the date of the passage of the Act; but as the levees elsewhere have been, and are to be, raised  $3\frac{1}{2}$  feet and materially strengthened, prevent overflow at other points, the volume of water passing into this diversion channel has been, and will be, greatly increased.

The maximum previous overflow of water into the Boeuf Basin occurred in 1927 and was estimated at 450,000 cubic feet per second. Said Flood Control Act involves an intentional, additional, occasional flooding, damaging and destroying of the lands and property within said District, title to which has been acquired by said District, and of lands and property on which said District holds said statutory  
71 lien as its sole and only income for the purpose of discharging its said bonded indebtedness, as the direct consequence of the construction of the entire project (Jadwin Plan) by the Government to relieve the channel of the River in times of high water, all of which was contemplated by the Congress when enacting said Flood Control Act, and constitutes a taking of plaintiff's property and its liens on said lands for public use for which the Government of the United States is liable to the plaintiff, as upon an implied contract, for such compensation as might have been awarded plaintiff had condemnation proceedings been instituted by the Government of the United States.

## V.

Said Flood Control Act provided that a Board to consist of the Chief of Engineers, the President of the Mississippi

River Commission, and a civil engineer chosen from civil life, be appointed by the President of the United States, by and with the consent and advice of the Senate, which Board was authorized and directed to consider the engineering differences between the adopted project (Jadwin Plan) and the plans recommended by the Mississippi River Commission in its special report dated November 28, 1927, and to recommend to the President such action as such Board might deem necessary to be taken in respect to such engineering differences, and it was provided further that the decision of the President upon all recommendations or questions submitted to him by such Board should be followed in carrying out the project adopted. There were very substantial differences in the plan of the Mississippi River Commission for the Boeuf River Floodway diversion and the plan of the Army Engineers (Jadwin Plan), as it affected the Cypress Creek Drainage District and its property, so that said District could not know just how its property was to be affected until those engineering differences were adjusted and settled.

Said Special Board created by Section I of said Flood Control Act reported to the President of the United States on August 8, 1928, recommending the engineering of the Jadwin Plan (the adopted project), and on August 13, 1928, the President of the United States approved "The policy and method of dealing with the problem set out in the report, dated August 8, 1928, and the plan for the first time became definite, certain and fixed as a matter of law, in so far

72 as it affects the Cypress Creek Drainage District and its property herein involved. Work on the project by the United States Government began, immediately on August 13, 1928, funds for the purpose being available, and construction work on this plan of flood control is now approximately 70 per cent complete, this plaintiff's property has been taken thereby as herein alleged.

## VI.

The project of flood control as adopted by the Flood Control Act of May 15, 1928, for which the Government of the United States assumed responsibility, differed from the old flood control system of levees, and levees only, by the deliberate creation of certain diversion channels to be sacrificed for the protection of the balance of the alluvial valley of the Mississippi River. The then Chief of Engineers, in his report to the Secretary of War, which was submitted by the Secretary of War to the Congress in connection with the

Jadwin Plan, which was enacted into law by said Flood Control Act, states that:

"The recommended plan (Jadwin Plan) fundamentally differs from the present project in that it limits the amount of flood water carried in the main river to its safe capacity, and sends the surplus water through lateral floodways. Its essential features and their functions are:

"Floodways from Cairo to New Madrid, from the Arkansas River through the Tensas Basin to the Red River, and from the Red through the Atchafalaya Basin to the Gulf of Mexico. These will relieve the main channel of the water it cannot carry and lower the floods to stages at which the levees can carry them" (Document No. 90, House of Representatives, 70th Congress, 1st Session, pp. 304).

The Jadwin Plan, as enacted into law by said Flood Control Act, further describes the plan for flood control as it affects the plaintiff's property, which is protected only by the "fuse-plug" or "safety-plug" section of the levee immediately below the mouth of Cypress Creek in Desha County, Arkansas, as follows:

"16. From the mouth of the Arkansas (River) to the Old River, at the mouth of the Red (River), extreme floods cannot be carried between levees of the Mississippi (River) without dangerous increase in their heights. A floodway for excess floods is provided down the Boeuf River, on the west side of the river. Excess water cannot be carried through the section on the east side, since it would be forced back into the main river by the highlands on the east bank below Vicksburg and have to be carried thence for 160 miles between the main river levees to the mouth of the Red River. The entrance to the floodway is closed by a safety plug section of the levee, at present grade, which is located at Cypress Creek, near the mouth of the Arkansas. To insure their safety until this section opens, the levees of the Mississippi (River), from the Arkansas to the Red, will be raised about three feet. To prevent flood waters from entering the Tensas Basin, except into the floodway during high floods, the levees on the south side of the Arkansas will be strengthened and raised about three feet as far upstream as necessary."

"17. The Section at the head of the floodway will protect the land within the floodway levees against any flood up to one of the magnitude of the 1922 flood. A flood of the magnitude somewhere between that of 1922 and of 1927 will break it, turning the excess water down the floodway, which will



carry it safely to the backwater area at the mouth of the Red River." (Parentheses ours.) (Document No. 90, p. 6.)

Said Jadwin Plan, enacted into law by said Flood Control Act, further recites, and the plaintiff alleges:

"The confinement of flood flows by levees has substantially raised the flood heights." (Document No. 90, p. 19.)

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"97. The water within the river channel does no damage whatever, and it should be kept within the channel as long as possible. The excess must be spilled through safety valves when the volume exceeds the safe capacity of the river. These safety valves consist of one controlled spillway, several relief or fuse-plug levees at present grade and one levee of reduced height, all emptying into natural floodways wholly or partially leveed." (Document No. 90, p. 23.)

"The levees generally will be raised about three feet, so that the selected, weaker relief levees will be at about the elevation of the present levee top and will surely serve their purpose." (Document No. 90, p. 24.)

"118. To insure that excess water will leave the main river, a fuse-plug section of the levee in the vicinity of Cypress Creek must be kept at its present strength and at its present grade, viz., three feet below new levee grade. This

74 relatively weak section will be long enough to discharge the greatest predicted possible excess water over and above the capacity of the leveed river below. In order to limit the land in the Tensas Basin overflowed by it, levees will be constructed on each side of the Boeuf River Bottom, where natural ridges do not serve, from the Cypress Creek levee to backwater in the lower Tensas Basin. Arkansas City is to be enclosed with a levee. This floodway will be wide enough to carry the water without clearing and without maintenance except for the side levees." (Document No. 90, p. 28.)



(These side levees or guide levees, have not yet been constructed by the Government; but the property against which Plaintiff has liens is in the floodway, whether said floodway be controlled or uncontrolled as at the present, and is subject to inundation and destruction whenever the fuse-plug levee gives way to protect the balance of the alluvial valley of the Mississippi River.)

"Due to the increase in flood height by reason of levee construction and drainage, it has been estimated that a stage over the present top at Cypress Creek might occur in the long run about once in twelve years." (Document No. 90, p. 28.)

"121. The remainder of the alluvial valley on each side of this stretch of the river, barring accident, will have complete protection from all possible floods." (House Document No. 90, p. 28.)

"The draw down from Cypress Creek relief levee into the Boeuf River diversion below makes it possible to protect the lower part of this section of the river from superfloods without excessive levee raising. \* \* \* The average amount that levees are to be raised throughout is approximately three and one-half feet above the present adopted grade." (Document No. 90, pp. 29-30.)

"The plan proposes the strengthening of the levees on the south side of the Arkansas and Red Rivers and raising them about three feet, as far upstream as is necessary for that purpose." (Document No. 90, p. 30.)

## VII.

Section 4 of the Flood Control Act provides:

"Sec. 4. The United States shall provide flowage rights for additional destructive flood waters that will pass by reason of diversions from the main channel of the Mississippi River \* \* \*."

The waters that will flow into the Boeuf Floodway or diversion channel will all be diverted from the main channel of the Mississippi River at a place and in a manner which has never been true before, but which subjects the property against which plaintiff has liens to inundation, damage and destruction whenever a flood stage is reached in the Mississippi River sufficient to overtop or wash away the fuse-plug levee hereinbefore mentioned. The main levees of the Mississippi River have been strengthened and raised so as to now insure the flooding of the plaintiff's property at pre-

determined stages of the river. The purpose of leaving the fuse-plug levee hereinbefore mentioned is solely for the purpose of having the water break over same at flood side and flood this diversion channel or floodway in which plaintiff's property is situated. It is an uncontrolled spillway. There is no provision of law for rebuilding the fuse-plug levee when it washes out, but plaintiff's property will then be left free to the ravages of the escaping waters of the Mississippi River with no protection whatever.

Pursuant to the provisions of said Flood Control Act, from Helena South the levees on the west bank of the Mississippi River will be maintained at sufficient height to hold all of the flood waters which reach this point from the entire basin of the upper Mississippi River and all of its tributaries, carrying all of this water within the levees to a point about twelve miles distant from a similar levee on the south bank of the Arkansas River. Through this gap the White River passes into the Mississippi River about midway between the lower end of the levee on the West bank of the Mississippi River above mentioned and the mouth of the Arkansas River. Lying

76 between these levee ends to the north and west of the 12-mile gap is located a pool or basin for backwater some twelve hundred square miles in area, into which will be poured all of the waters of the White River and its watershed, as well as the overflow on the north bank of the Arkansas River for a distance upstream to the locality of Pine Bluff, Arkansas.

It is not contemplated under the present law that any levee will be built along this stretch of the River. When this basin of twelve hundred square miles is filled, its outlet, together with all water coming down the White and Arkansas Rivers, will be discharged through the 12-mile gap above described.

This combined volume will be added to that in the main stream of the Mississippi River, consisting both of its own water brought down in its own channel from Cairo, Illinois, and also the quantity of water which will have been returned into the Mississippi River under the present law, from the St. Francis River Basin north of Helena; then for a few miles the comparatively narrow channel of the main levees of the Mississippi River will carry this enormous volume of concentrated flood water until it reaches and is hurled against the fuse-plug levee at the head of the Boeuf River Basin hereinbefore referred to, a comparatively short distance from the plaintiff's property. The "fuse-plug" levee is so named because in due course during flood stages of the Mississippi River this stretch of the levee will break and be

washed out when the River reaches the predetermined height fixed by the Army Engineers, in similar fashion to what happens when a current of electricity attains a designated voltage sufficient to blow out the fuse in electrical machinery. It is contemplated that this concentration of flood water upon the fuse-plug levee will overtop the fuse-plug levee and cause a crevasse through the fuse-plug levee which will gradually widen to include the whole of twenty or more miles of said relief levee if the condition of the Mississippi River so requires for the safety of the remainder of its alluvial valley.

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## VIII.

Prior to the adoption of the Flood Control Act, the Cypress Creek Drainage District, and all of the property owners interested therein whose property is now protected only by said fuse-plug levee, had, and exercised, their legal right of protecting themselves against inundation by raising the present fuse-plug levee during flood times. This right of self-defense has been taken from the plaintiff, and the owners of property within said Cypress Creek Drainage District, by the Flood Control Act.

Paragraph number 120 of the adopted project provides as the key to the entire system of flood control that:

"The United States have control over the Cypress Creek levee and keep it substantially at its present strength and present height" (Document No. 90, p. 28).

Paragraph number 118 of the adopted project further provides that:

"To insure that excess water will leave the main river, a fuse-plug section of the levee in the vicinity of Cypress Creek must be kept at its present strength and at its present grade, viz., 3 feet below the new levee grade."

## IX.

Plaintiff further relies upon the provision of Section 3 of said Flood Control Act which provides:

"\* \* \* if in carrying out the purposes of this Act it shall be found that upon any stretch of the banks of the Mississippi River it is impracticable to construct levees, either because such construction is not economically justified, or because such construction would unreasonably restrict the flood channel, and lands in such stretch of the River are subjected to overflow and damage which are not now overflowed or damaged by reason of the construction of levees on the opposite

banks of the river, it shall be the duty of the Secretary of War and the Chief of Engineers to institute proceedings on behalf of the United States Government to acquire either the absolute ownership of the lands so subjected to overflow and damage or floodage rights over such lands."

Plaintiff alleges that the levees on the opposite banks of the River from the property on which it has liens have been constructed and raised as hereinbefore described and as directed by law, so that the property on which it has such  
78 liens is now subject to overflow and damage by the break of the fuse-plug levee within the meaning of this Section of said Flood Control Act, again constituting a taking of its property for which plaintiff is entitled to just compensation under the provisions of the Act, as well as under the Fifth Amendment to the Constitution of the United States.

Plaintiff further alleges that by the express provision of Section 2 of said Flood Control Act "no local contribution to the project herein adopted is provided." Prior to the adoption of said Flood Control Act, the plaintiff enjoyed equal protection against flood menace, without discrimination, but the primary purpose of the said Flood Control Act is to protect the balance of the alluvial valley of the Mississippi River by sacrificing the plaintiff's property and the property of others within the Boeuf River spillway similarly situated. Unless, therefore, plaintiff is compensated for all damage by it sustained as herein alleged, then this plaintiff will be forced to contribute its entire damages to the project, notwithstanding said provision of the Act to the contrary.

## X.

The adopted project has destroyed the entire salable value of said lands, and has destroyed the ability of said lands to discharge the tax burden against them due to the said District and to the plaintiff, and has impaired and practically destroyed the full use and enjoyment of said property for all practical purposes. The result of setting apart this area as a floodway or diversion channel and of preventing the escaping of flood waters of the Mississippi River elsewhere, and the intentional dedication of this property as a floodway by said Flood Control Act, has subjected the property to flood menace at any and all times. The uncertainty of the safety of persons living upon said property makes it unwise and unsafe to develop said property agriculturally, or to undertake to use said property at any time. The adopted project has had the effect of casting a cloud on the title of the owners of



79 said land and property and all interests thereto so that the land has been deprived of all reasonable market value therefor, and persons cannot be interested in developing said lands into profitable farms, or to use said lands for any other purpose for which they are fitted, because the Government of the United States has substantially taken possession of the property for a diversion channel or floodway of the Mississippi River. The aforesaid acts have substantially damaged this plaintiff individually as owner of bonds of the District and in its capacity as trustee aforesaid.

### XI.

Plaintiff further alleges that notwithstanding the fact that the Fifth Amendment of the Constitution of the United States provides, " \* \* \* nor shall any person \* \* \* be deprived \* \* \* of property without due process of law, nor shall private property be taken for public use without just compensation " and notwithstanding the provision of said Flood Control Act, "That the United States shall provide flowage rights for additional destructive flood waters that will pass by reason of diversion from the main channel of the Mississippi River," and notwithstanding the further provision of said Act that the "Secretary of War may cause proceedings to be instituted for the acquirement by condemnation of any lands, easements or rights of way which, in the opinion of the Secretary of War, and the Chief of Engineers, are needed in carrying out this project, the said proceedings to be instituted in the United States District Court for the District in which the land, easement or right of way is located," no condemnation proceedings of any kind has been commenced against the plaintiff, nor against any other person for the condemnation of the property now owned by said Cypress Creek Drainage District, and no compensation of any kind has been paid or offered to the plaintiff for the taking and/or damage of the property herein involved as aforesaid.

### XII.

80 That on the first day of February, 1916, the Cypress Creek Drainage District duly executed and issued its series of bonds in the aggregate amount of \$700,000.00, numbered from 1 to 785, inclusive, and maturing serially on the first day of August of each year from 1922 to 1946, inclusive, payable at the St. Louis Union Trust Company, in the City of St. Louis, and bearing interest at the rate of five and one-half per cent per annum, of which there are now outstanding \$650,000.00; that Cypress Creek Drainage District, on the 6th day of May, 1916, executed its pledge by which it conveyed to the plaintiff, St. Louis Union Trust Company, for



the security of said bonds, the properties and revenues of the district, including all uncollected assessments levied by the said district on the real property, railroads and tramroads therein, together with all assessments that might thereafter be levied thereon, which pledge was duly filed for record in the office of the Recorder of Deeds of Desha County, Arkansas on the 10th day of May, 1916, and duly recorded in Record Book 30, page 286; in the office of the Recorder of Deeds of Chicot County on the 16th day of May, 1916, and duly recorded in Record Book W 2, at page 355; and in the office of the Recorder of Deeds of Drew County, Arkansas, on the 27th day of May, 1916, and recorded in Record Book 22, page 430.

### XIII.

As a further element in the damage sustained as aforesaid plaintiff alleges that the ability of the owners of all of the property in said Boeuf River Floodway has been so destroyed because of the constant menace of floods, that payments of annual installments on the assessed benefits have practically ceased, and the ability of plaintiff to collect has been taken and destroyed. In fact, the entire amount of the value of assessed benefits, or betterments which were placed by law upon the territory of said drainage district has now completely been taken and destroyed. Said entire assessment of benefits was placed by law as a tax burden against the territory of the said drainage district as the measure of increased value to the property because of flood protection and drainage, which has now been completely destroyed by the provisions of the said Flood Control Act which has converted this area into a diversion or second channel of the Mississippi River during flood periods; and these assessed benefits which have been so taken and destroyed constitute the only income or security for the payment of said bonds, and credit was extended by the bondholders to the district solely in reliance upon said assessed benefits which have now been destroyed, and without flood protection the entire drainage system constructed by Cypress Drainage District has been rendered valueless and worthless, and the benefits, for which the property owners bonded their lands, have been completely appropriated, taken and destroyed.

### XIV.

As additional element of damage the plaintiff further alleges that the entire physical drainage system has been rendered worthless and has been appropriated and taken by

the United States Government for a diversion channel and floodway of the Mississippi River. The fuse-plug levee in the natural course of events is predestined to blow out and be destroyed, with no provision of law for its restoration, and when this occurs all of the drainage ditches within the floodway will be washed away, filled with silt, sediments and debris, and the entire physical drainage system will be rendered utterly worthless, to the complete destruction of the entire investment which has been made in said district.

## XV.

This plaintiff cannot now state the exact amount of its damages individually and as trustee caused by the aforesaid acts because it does not know the precise number of acres of land within said District against which assessments and levies of taxes have been made. It will procure and introduce in evidence the necessary data from which its damages can be fixed.

Wherefore this plaintiff, as trustee aforesaid, prays judgment against the defendant for all of the aforesaid unpaid assessments and taxes levied against the plaintiff's, Mrs. Julia Spokenbarger's, said lands, and prays judgment against the defendant in its individual capacity for the proportionate part of said unpaid assessments and taxes as its ownership of \$167,500.00 worth of bonds and unpaid interest thereon bears to the whole of the outstanding bonds and interest thereon of said District.

BRYAN, WILLIAMS, CAVE &  
McPHEETERS,  
Attorneys for Plaintiff St. Louis  
Union Trust Company.

Endorsed: "Filed Jan. 6, 1937. Sid B. Redding, Clerk"

Separate Petition of St. Louis Union Trust Company as Trustee for Bondholders in a Pledge Instrument and Mortgage Executed by the Red Fork Levee District.

In the United States District Court, Eastern District of Arkansas, Western Division.

Mrs. Julia Caroline Spokenbarger, Plaintiff,

vs.

The United States of America, Defendant.

Comes now the St. Louis Union Trust Company in pursuance of the order of the Court requiring it to appear in this action and to plead, answer or demur in this cause, and states

that it does not own any bonds issued by the Red Fork Levee District which are a lien against the lands of the plaintiff, Julia Caroline Spokenbarger; that it is trustee for bondholders in a pledge instrument and mortgage issued by the Red Fork Levee District pledging assessments made against the lands of said plaintiff, and that it files this its separate petition in this cause as trustee only, having no individual interest in this cause.

This plaintiff further states as follows:

## I.

Plaintiff is a corporation organized and existing under and by virtue of the laws of the State of Missouri, and as such is authorized to accept and execute trusts.

## II.

Red Fork Levee District was created by Act No. 93 of the Acts of Arkansas for the year 1891, and was organized to construct levees, and is composed of the following described lands in Desha County, Arkansas: Silver Lake and Red Fork Townships, and that part of Old River and Wilkerson Townships south of the Arkansas River in Desha County. By Act No. 23 of the Acts of Arkansas, for the year 1917, said district was authorized to levy taxes and issue bonds not to exceed \$100,000.00; said Act empowered the board of levee inspectors of the district to issue a pledge or mortgage on all of its income to secure the payment of such bonds as it might issue. The said Act gives to the holders of the bonds issued by the district a lien, to secure the payment of them, on all of the lands within the district. The said district issued and sold its bonds in the sum of \$100,000.00, dated as 84 of August 1st, 1915, payable serially on August 1st of each year from August 1st, 1916, to August 1st, 1936, inclusive, bearing interest at the rate of 6 percent per annum. To secure the payment of said bonds the district executed a pledge or mortgage to the St. Louis Union Trust Company, as trustee, on all of its uncollected assessments and all assessments that might thereafter be levied by the district, and said pledge was duly recorded. The district had paid \$69,500.00 of the principal of said bonds. The lien and bonds issued by said district is a first and a preferred one upon all of the assessments which were made on the lands, lots and so forth in the said district, or which might thereafter be levied on said lands by its successor. That of said bonds there are now outstanding and unpaid \$30,500.00. That the bonds are in default on the payment of interest due February 1st, 1932, and on the interest subsequent

thereto. The District levied an assessment of 2 cents annually upon the assessed valuation of the lands within the District.

### III.

The Southeast Arkansas Levee District is a quasi-municipal corporation of the State of Arkansas, created by Act No. 83 of the General Assembly of the State of Arkansas for the year 1917, and embraces and includes all of the property formerly embraced in the Red Fork Levee District.

### IV.

After the passage of the Flood Control Act by the Congress of the United States, hereinafter more particularly described, and for reasons hereinafter alleged, property owners within the District, realizing that their lands and property had been so damaged by said Act of Congress as to be worthless, or their values seriously impaired, ceased paying annual taxes to such an extent as to bring about defaults on all of the outstanding bonded indebtedness of the District, causing the inability of the District to meet the annual maturities of principal and interest of said indebtedness.

Whereupon, at the suit of the Trustees for the bondholders of said bonded indebtedness of said District, in the case of Mercantile Commerce Bank & Trust Company, Trustee, Mercantile Commerce National Bank in St. Louis, Trustee, plaintiffs, v. Southeast Arkansas Levee District, defendant, with St. Louis Union Trust Company, Trustee, as Intervenor, being all of the Trustees for all of the bond issues involved, H. Grady Miller was appointed by the United States District Court for the Western Division of the Eastern District of Arkansas, as Receiver of said District.

### V.

The plaintiff alleges that under said Flood Control Act of Congress the United States adopted, and enacted into law, a project for the flood control of the Mississippi River in its alluvial valley, and for its improvement from the Head of Passes to Cape Girardeau, Missouri, in accordance with the engineering plan set forth and recommended in the report submitted by the Chief of Engineers to the Secretary of War, dated December 1, 1927, and printed in House Document No. 90, 70th Congress, First Session, which engineering plan is commonly called the "Jadwin Plan." The Act provides for raising the levees of the Mississippi River generally three feet, for improving the carrying capacity of the main chan-



nel to its safe capacity through the provision of specified diversion channels. Among these is the Boeuf Floodway, which will carry excess flood waters from a point below the mouth of the Arkansas River across and over a large portion of the area constituting the Southeast Arkansas Levee District, completely traversing said Levee District to and through the Boeuf River Basin into the backwater area at the mouth of the Red River in the State of Louisiana. The Plan leaves the section of the Mississippi River Levee running from approximately the mouth of Cypress Creek in Desha County, Arkansas, south to approximately Luna Landing, in Chicot County, Arkansas, (being the levee which constitutes an important sector in the eastern protection boundaries of said Southeast Arkansas Levee District), known as the "fuse-plug" levee, at its height on the date of the passage of the Act; but as the levees elsewhere have been, and are to be, raised three and one-half feet or materially strengthened, preventing overflow at other points, the volume of water passing into this diversion channel has been, and will be, greatly increased.

The maximum previous overflow of water into the Boeuf Basin occurred in 1927 and was estimated as 450,000 cubic feet per second. Said Flood Control Act involves an intentional, occasional flooding, damaging and destroying of the lands and property within said District, title to which has been acquired by said District, and of lands and property on which said District holds said statutory lien as its sole 86 and only income for the purpose of discharging its said bonded indebtedness, as the direct consequence of the construction of the entire project (Jadwin Plan) by the Government to relieve the channel of the River in times of high water, all of which was contemplated by the Congress when enacting said Flood Control Act, and constitutes a taking of plaintiff's property for public use for which the Government of the United States is liable to the plaintiff, as upon an implied contract, for such compensation as might have been awarded the plaintiff had condemnation proceedings been instituted by the Government of the United States.

## VI.

Said Flood Control Act provided that a Board to consist of the Chief of Engineers, the President of the Mississippi River Commission, and a civil engineer chosen from civil life, be appointed by the President of the United States, by and with the consent and advice of the Senate, which Board was authorized and directed to consider the engineering dif-

ferences between the adopted project (Jadwin Plan) and the plans recommended by the Mississippi River Commission in its special report dated November 28, 1927, and to recommend to the President such action as such Board might deem necessary to be taken in respect to such engineering differences, and it was provided further that the decision of the President upon all recommendations or questions submitted to him by such Board should be followed in carrying out the project adopted. There were very substantial differences in the plan of the Mississippi River Commission for the Boeuf River Floodway diversion as it affected the Southeast Arkansas Levee District and its property, and the plan of the Army Engineers (Jadwin Plan), so that said District could not know just how its property was to be affected until those engineering differences were adjusted and settled.

Said Special Board created by Section 1 of said Flood Control Act reported to the President of the United States on August 8, 1928, recommending the engineering of the Jadwin Plan (adopted project), and on August 13, 1928, the President of the United States approved "the policy and method of dealing with the problem set out in the report, dated August 8, 1928," and the plan for the first time became definite, certain and fixed as a matter of law, in so far as it affects the Southeast Arkansas Levee District and its property herein involved. Work on the project by the United States Government began immediately on August 13, 1928; funds for the purpose being available, and construction work on this plan of flood control is now approximately 70  
87 percent complete.

## VII.

The Project of flood control as adopted by the Flood Control Act of May, 15, 1928, for which the Government of the United States assumed responsibility, differed from the old flood control system of levees, and levees only, by the deliberate creation of certain diversion channels to be sacrificed for the protection of the balance of the alluvial valley of the Mississippi River. The then-Chief of Engineers, in his report to the Secretary of War, which was submitted by the Secretary of War to the Congress in connection with the Jadwin Plan, which was enacted into law by said Flood Control Act, states that:

"The recommended plan (Jadwin Plan) fundamentally differs from the present project, in that it limits the amount of flood water carried in the main river to its safe capacity, and sends the surplus water through lateral floodways. Its essential features and their functions are:

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The Jadwin Plan, as enacted into law by said Flood Control Act, further describes the plan for flood control as it affects the plaintiff's property, which is protected only the "fuse plug" section of the levee immediately below the mouth of Cypress Creek, in Desha County, Arkansas, as follows:

"16. From the mouth of the Arkansas (River) to the Old River, at the mouth of the Red (River) extreme floods cannot be carried between levees of the Mississippi (River) without dangerous increase in their heights. A floodway for excess floods is provided down the Boeuf River, on the west side of the river. Excess water cannot be carried through the section on the east side, since it would be forced back into the main river by the highlands on the east bank below Vicksburg and have to be carried thence for 160 miles between the main river levees to the mouth of the Red River. The entrance to the floodway is closed by a safety-plug section of the levee, at present grade, which is located at Cypress Creek near the mouth of the Arkansas. To insure their safety until this section opens, the levees of the Mississippi (River), from the Arkansas to the Red, will be raised about three feet. To prevent flood waters from entering the Tensas Basin, except into the floodway during high floods, the levees on the south side of the Arkansas will be strengthened and raised about three feet as far upstream as necessary.

"17. The Section at the head of the floodway will protect the land within the floodway levees against any flood up to one of the magnitude of the 1922 flood. A flood of the magnitude somewhere between that of 1922 and of 1927 will break it, turning the excess water down the floodway, which will carry it safely to the backwater area at the mouth of the Red River." (Parentheses ours.) (Document No. 90, p. 6).

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"The confinement of flood flows by levees has substantially raised the flood heights" (Document No. 90, p. 19).

"96. The confinement of the Mississippi River within levees and the great development of drainage systems in recent years have raised flood stages materially, and this raising has exceeded estimates made in the past. Were it attempted to hold the water within the present levee lines by raising them, river stages are possible as much as \* \* \* 14 feet above the present levee grade at Arkansas City, \* \* \*. The levees now have an average height of about 18 feet. The practical means to meet this situation is to spill the water out of the main leveed channel at selected points when the stages reach the danger point.

"97. The water within the river channel does no damage whatever and it should be kept within the channel as long as possible. The excess must be spilled through safety valves when the volume exceeds the safe capacity of the river. These safety valves consist of one controlled spillway, several relief or fuse-plug levees at present grade and one levee of reduced height, all emptying into natural floodways wholly or partially leveed" (Document No. 90, p. 23).

"The levees generally will be raised about three feet, so that the selected, weaker, relief levees will be at about the elevation of the present levee top and will surely serve their purpose." (Document No. 90, p. 24).

"118. To insure that excess water will leave the main river, a fuse-plug section of the levee in the vicinity of Cypress Creek must be kept at its present strength and at its present grade, viz., three feet below the new levee grade. This relatively weak section will be long enough to discharge the greatest predicted possible excess water over and above the capacity of the leveed river below. In order to limit the land in the Tensas Basin overflowed by it, levees will be constructed on each side of the Boeuf River Bottom, where natural ridges do not serve, from the Cypress Creek levee to backwater in the lower Tensas Basin. Arkansas City is to be enclosed with a levee. This floodway will be wide enough to carry the water without clearing and without maintenance, except for the side levees" (Document No. 90, p. 28).

(These side levees, or guide levees, have not yet been constructed by the Government; but plaintiff's property is in the floodway whether said floodway be controlled or uncontrolled, as at the present, and is subject to inundation and destruction whenever the fuse-plug levees gives way to protect the balance of the alluvial valley of the Mississippi River.)

"Due to the increase in flood height by reason of levee construction and drainage, it has been estimated that a stage



over the present top at Cypress Creek might occur in the long run about once in twelve years" (Document No. 90, p. 28).

"121. The remainder of the alluvial valley on each side of this stretch of the river, barring accident, will have complete protection from all possible "follids" (House Document No. 90, p. 28)."

"The draw down from Cypress Creek relief levee into the Boeuf River diversion below makes it possible to protect the lower part of this section of the river from super-floods without excessive levee raising. \* \* \* the average amount that levees are to be raised throughout is approximately three and one-half feet above the present adopted grade". Document No. 90, p. 30).

### VIII.

89 Section 4 of the Flood Control Act provides:

"Sec. 4. The United States shall provide flowage rights for additional destructive flood waters that will pass by reason of diversions from the main channel of the Mississippi River \* \* \*"

The waters that will flow into the Boeuf Floodway or diversion channel will all be diverted from the main channel of the Mississippi River at a place and in a manner which has never been true before, but which subjects the property against which plaintiff has liens to inundation, damage and destruction whenever a flood stage is reached in the Mississippi River sufficient to overtop or wash away the fuse-plug levee hereinbefore mentioned. The main levees of the Mississippi River have been strengthened and raised so as to now insure the flooding of the said property at predetermined stages of the River. The purpose of leaving the fuse-plug levee hereinbefore mentioned is solely for the purpose of having the water break over same at flood side and flood this diversion channel or floodway in which plaintiff's property is situated. It is an uncontrolled spillway. There is no provision of law for rebuilding the fuse-plug levee when it washes out, but said property will then be left free to the ravages of the escaping waters of the Mississippi River with no protection whatever.

Pursuant to the provisions of said Flood Control Act, from Helena South, the levees on the west bank of the Mississippi River will be maintained at sufficient height to hold all of the flood waters which reach this point from the entire basin of the upper Mississippi River and all of its tributaries, carrying all of this water within the levees to a point about

twelve miles distant from a similar levee on the south bank of the Arkansas River. Through this gap the White River passes into the Mississippi River about midway between the lower end of the levee on the West bank of the Mississippi River above mentioned, and the mouth of the Arkansas River. Lying between these levee ends to the north and west of the twelve-mile gap is located a pool or basin for back-water, some twelve hundred square miles in area, into which will be poured all of the waters of the White River and its watershed, as well as the overflow on the north bank of the Arkansas River for a distance upstream to the locality of Pine Bluff, Arkansas.

90 . It is not contemplated under the present law that any levee will be built along this stretch of the River. When this basin of twelve hundred square miles is filled, its outlet, together with all water coming down the White and Arkansas Rivers, will be discharged through the twelve-mile gap above described.

This combined volume will be added to that in the main stream of the Mississippi River, consisting both of its own water brought down in its own channel from Cairo, Illinois, and also the quantity of water which will have been returned into the Mississippi River, under the present law, from the St. Francis River Basin north of Helena; then for a few miles the comparatively narrow channel of the main levees of the Mississippi River will carry this enormous volume of concentrated flood water until it reaches and is hurled against the fuse-plug levee at the head of the Boeuf River Basin hereinbefore referred to, a comparatively short distance from the Plaintiff's property. The "fuse-plug" levee is so named because in due course, during flood stages of the Mississippi River, this stretch of the levee will break and be washed out when the River reaches the predetermined height fixed by the Army Engineers in similar fashion to what happens when a current of electricity attains a designed voltage sufficient to blow out the fuse in electrical machinery. It is contemplated that this concentration of flood water upon the fuse-plug levees will overtop the fuse-plug levee and cause a crevasse through the fuse-plug levee which will gradually widen to include the whole of twenty or more miles of said relief levee if the condition of the Mississippi River so requires for the safety of the remainder of its alluvial valley.

## IX.

Prior to the adoption of the Flood Control Act the Southeast Arkansas Levee District, and all of the property owners interested therein, including the plaintiff, whose property

is now protected only by said fuse-plug levee, had and exercised their legal right of protecting themselves against inundation by raising the present fuse-plug levee during flood times. This right of self-defense has been taken from the owners of property within said Southeast Arkansas Levee District, by the Flood Control Act.

Paragraph numbered 120 of the adopted project provides as the key to the entire system of flood control that:

91 "The United States must have control over the Cypress Creek levee and keep it substantially at its present strength and present height" (Document No. 90, p. 28).

Paragraph numbered 118 of the adopted project further provides that:

"To insure that excess water will leave the main river, a fuse-plug section of the levee in the vicinity of Cypress Creek must be kept at its present strength and at its present grade, viz., three feet below the new levee grade."

Plaintiff further relies upon the provision of Section 3 of said Flood Control Act, which provides:

"... If, in carrying out the purpose of this Act, it shall be found that upon any stretch of the banks of the Mississippi River it is impracticable to construct levees, either because such construction is not economically justified, or because such construction would unreasonably restrict the flood channel, and lands in such stretch of the River are subjected to overflow and damage which are not now overflowed and damaged by reason of the construction of levees on the opposite banks of the river, it shall be the duty of the Secretary of War and the Chief of Engineers to institute proceedings on behalf of the United States Government to acquire either the absolute ownership of the lands so subjected to overflow and damage or floodage rights over such lands."

Plaintiff alleges that the levees on the opposite banks of the River from the property of plaintiff have been constructed and raised as hereinbefore described and as directed by law, so that the property against which it has liens is now subject to overflow and damage by the breach of the fuse-plug levee within the meaning of this Section of said Flood Control Act, again constituting a taking of its property for which plaintiff is entitled to just compensation under the provisions of the Act, as well as under the Fifth Amendment to the Constitution of the United States.

Plaintiff further alleges that by the express provision of Section 2 of said Flood Control Act "no local contribution to the project herein adopted is provided". Prior to the adoption of said Flood Control Act the plaintiff enjoyed equal protection against flood menace, without discrimination, but the primary purpose of the said Flood Control Act is to protect the balance of the alluvial valley of the Mississippi River by sacrificing the plaintiff's property and the property of others within the Boeuf River spillway similarly situated. Unless, therefore, plaintiff is compensated for all damages by it sustained, as herein alleged, then plaintiff will be forced to contribute its entire damages to the project, notwithstanding said provision of the Act to the contrary.

## XI.

92 The adopted project has destroyed the entire salable value of said lands, and has destroyed the ability of said lands to discharge the tax burden against them due to the said Levee District, and has impaired and practically destroyed the full use and enjoyment of said property for all practical purposes. The result of setting apart this area as a floodway or diversion channel and of preventing the escaping of the flood waters of the Mississippi River elsewhere, and the intentional dedication of this property as a floodway by said Flood Control Act, has subjected the property to flood menace at any and all times. The uncertainty of the safety of persons living upon said property makes it unwise and unsafe to develop said property agriculturally, or to undertake to use said property at any time. The adopted project has had the effect of casting a cloud on the title of the liens of the plaintiff on said lands and property, so that said lands and liens have been deprived of all reasonable market value because the Government of the United States has substantially taken possession of the property for a diversion channel or floodway of the Mississippi River. The aforesaid acts have substantially damaged this plaintiff in its capacity as trustee aforesaid.

Plaintiff further alleges that notwithstanding the fact that the Fifth Amendment of the Constitution of the United States provides: " . . . nor shall any person . . . be deprived . . . of property without due process of law, nor shall private property be taken for public use without just compensation", and notwithstanding the provision of said Flood Control Act: "That the United States shall provide flowage rights for additional destruction flood waters that will pass by reason of diversion from the channel of the Mississippi River", and notwithstanding the further provision of said



Act that the "Secretary of War may cause proceedings to be instituted for the acquirement by condemnation of any lands, easements or rights of way which, in the opinion of the Secretary of War, and the Chief of Engineers, are needed in carrying out this project, the said proceedings to be instituted in the United States District Court for the District in which the land, easements or right of way is located", so condemnation proceeding of any kind has been commenced against the plaintiff, nor against any other person for the condemnation of the property now owned by said Southeast Arkansas Levee District, and no compensation of any kind has been paid or offered to the plaintiff for the taking and/or damage of the property herein involved as aforesaid.

93

## • XII.

For further cause of action, the plaintiff alleges that the value of all moneys which have been spent in the past for the construction of levees to protect the area of the Red Fork Levee District from flood waters, to secure which the said District has bonded itself as aforesaid, has now been destroyed and rendered valueless by the adopted project (the (Jadwin Plan). The protection against flood menace and damage for which the Red Ford Levee District bonded the lands within its area has now been taken by the Government of the United States by the condemnation of the area as a diversion channel of the Mississippi River.

## XIII.

This plaintiff cannot now state the exact amount of its damage as trustee caused by the aforesaid acts because it does not know the precise number of acres of land within said District against which assessments and levies of taxes have been made. It will procure and introduce in evidence the necessary data from which its damages can be fixed.

Wherefore this plaintiff, as trustee aforesaid, prays judgment against defendant for all of the aforesaid unpaid assessments and taxes levied against the plaintiff's (Mrs. Sponenbarger's) said lands.

**BRYAN, WILLIAMS, CAVE & Mc  
PHEETERS,**

Attorneys for Plaintiff St. Louis  
Union Trust Company.

Endorsed: "Filed Jan. 6, 1937, Sid B. Redding, Clerk."

94 Answer of the United States of America to the Petition  
of Plaintiff Julia Caroline Sponenbarger.

Comes now the defendant, the United States of America,  
through and by Fred Isgrig, United States District Attorney

for the Eastern District of Arkansas, and herewith files its answer in the above entitled cause, in the manner and form as follows, to-wit:

The defendant admits that the plaintiff is a citizen of the State of Arkansas and of Desha County, as alleged, and that her action is a suit of a civil nature.

The defendant denies that it has any knowledge upon which it could predicate its belief as to whether or not the promises described in plaintiff's petition are owned by the said plaintiff, and therefore asks that the plaintiff be required to make affirmative proof thereof.

The defendant further admits that the Congress of the United States enacted into law an act designed and intended for control of flood waters on the Mississippi River in its Alluvial Valley, being designated as the Act of May 15, 1928, C. H. 569, and further admits that said Act approved and adopted the engineering plan set forth and recommended in the report submitted by the Chief of Engineers to the Secretary of War, dated December 1, 1927, and printed in House Document No. 90, 70th Congress, First Session, and authorized the prosecution of same by the Secretary of War under the supervision of the Chief of Engineers, subject to the exceptions and provisions of Section I of said Act. The defendant, however, denies that said Act or any provision thereof created any contractual obligation in any manner between this plaintiff and the defendant, as in said petition alleged, or in any other manner whatsoever, either expressed or implied, or that it created any obligation on the part of  
95 the United States to pay the plaintiff any sum whatsoever.

The defendant further denies that the passage and approval of said Act constituted "a taking of plaintiff's property" under the Fifth Amendment to the Constitution of the United States, or that the defendant has done any act that had for its purpose or could be construed as a "taking" of plaintiff's property, or has invaded any right, privilege or prerogative of said plaintiff in the free and the untrammelled ownership, enjoyment, use and control thereof, as in said petition alleged, or in any other manner whatsoever, or that the plaintiff has been damaged by the defendant in the sum of Four Thousand Dollars (\$4,000.00) or any other sum whatever.

The defendant specifically denies that it has taken from the plaintiff and all those similarly situated, the right to protect themselves, their lands and their property from excessive flood waters of the Mississippi River or its tributaries, as in

said petition alleged or otherwise, or that the said defendant has taken or in anywise usurped the rights and prerogatives of the said State of Arkansas, or any of its political subdivisions, or of any citizen therein, by any plan of flood control on the Mississippi River or its tributaries or elsewhere. The defendant avers that the plaintiff and others similarly situated, as well as the sovereign State of Arkansas and any political subdivision thereof, have now and ever have had the same rights, powers and privileges of protecting themselves, and their property from flood waters from the Mississippi River or elsewhere, as was ever permitted prior to the enactment of the Flood Control Act of 1928, hereinbefore referred to.

Further answering, the defendant specifically denies each and every allegation of plaintiff's petition that has not heretofore been admitted, qualified or specifically denied.

For further, separate and additional defense to plaintiff's action, the defendant alleges that the 74th Congress of the United States, First Session, adopted and passed Public Act 678, which was duly approved by the President on the 15th of June, 1936, and thereafter became identified as Chapter 548 of June 15, 1936, 49 Stat., which said Act amended and modified the Flood Control Act of 1928, referred to in this answer, in accordance with the recommendations of

96 Section forty-three of the report submitted by the Chief of Engineers to the Chairman of the Committee on flood control, dated February 12, 1935, and printed in House Document on flood control, Document No. 1, 74th Congress, First Session, and as modified and amended by Congress prior to the adoption thereof. That the aforesaid designated as the Eudora Floodway Project, defined in the aforesaid report, was substituted for the so-called Boeuf Floodway of the 1928 project, and which so-called Boeuf Floodway was hereby abandoned as a part of the flood control project and the Eudora Floodway substituted in place thereof. That said Eudora Floodway is a different and distinct engineering design than the so-called Boeuf Floodway, in that the intake of the said Eudora Floodway is 120 miles by the present river course below the confluence of the Arkansas and the Mississippi Rivers, thereby removing all the alleged hazards and speculative dangers and damages to lands at the head of the former Boeuf Floodway, as in plaintiff's petition alleged, the existence of which in truth and in fact the defendant denies ever did exist.

The defendant further denies that the Boeuf Floodway, so-called, was ever established, constructed or brought into being

by the Chief of Engineers or any other agency of the United States Government, or that the same was ever established as a fact, or that any flood waters of the main channel of the Mississippi River was ever diverted by the defendant or any of its servants or agents into the territory designed as the Boeuf Floodway, or that any damage was ever wrought, actually or potentially, to any land or property therein, by the project as defined in the said 1928 Act, including the lands described in the petition as the property of the plaintiff.

The defendant further avers and alleges that, if the land alleged to belong to the plaintiff suffered any damage at any time as in the said petition defined or otherwise, after the passage of the 1928 Flood Control Act, that such damages were speculative, imaginary and consequential in their nature, rather than actual, and denies that the United States is in any manner liable therefor; and if by the passage of said act, a right of action thereunder accrued to the plaintiff, which the defendant denies, such action and all rights thereunder, if any ever existed, the existence of which defendant denies, such action and all claims or rights ceased to exist and abated after the passage and final approval of the aforesaid Act of June 15, 1936.

Wherefore, having fully answered the petition of plaintiff, the defendant herein asks that the relief sought by plaintiff be denied and that her action be dismissed with costs, and for all other just and proper relief which the premises and proof may show the defendant is entitled.

FRED A. ISGRIG,

U. S. Dist. Atty., Eastern Dist. of Ark.

JOHN C. DYOTT,

Special Asst. to the Attorney General.

Endorsed: "Filed Jan. 21, 1937, Sid B. Redding, Clerk."

98 (Order substituting Cypress Creek Drainage District as party Plaintiff in lieu of A. H. Rowell, et al., as Receivers, etc.)

In the United States District Court, Eastern District of Arkansas Western Division.

Mrs. Julia Caroline Sponenbarger, Plaintiff,

No. 7984 vs.

The United States of America, Defendant.

There is presented to the court the motion of the Cypress Creek Drainage District that it be substituted as a party.



plaintiff herein for A. H. Rowell and W. R. Humphrey, as Receivers for the Cypress Creek Drainage District; and the court finds that said Receivers were duly discharged as Receivers of said Cypress Creek Drainage District by an order of this court made and entered on the 9th day of April, 1937, and the affairs of said district were turned back to the Board of Commissioners; and that said motion to substitute should be granted.

It is therefore ordered that the Cypress Creek Drainage District of Desha, Chicot and Lincoln Counties, Arkansas, and its Board of Commissioners, be substituted as party plaintiff herein in lieu of A. H. Rowell and W. R. Humphrey, as Receivers for said District.

Done on this 14th day of May, 1937.

CHARLES B. DAVIS,  
United States District Judge.

Endorsed: "Filed May 14, 1937, Sid B. Redding, Clerk."

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99 Entry of Appearance of Cypress Creek Drainage District.

The Cypress Creek Drainage District of Desha, Chicot, and Lincoln Counties, Arkansas, hereby enters its appearance in this cause, and adopts as its own the defensive pleadings heretofore filed by Alex H. Rowell and Wm. R. Humphrey, as Receivers for the Cypress Creek Drainage District.

CYPRESS CREEK DRAINAGE DISTRICT OF DESHA, CHICOT AND LINCOLN COUNTIES, ARKANSAS.

By DeWitt Poe, Lamar Williamson, Its Attorneys.

Endorsed: "Filed May 17, 1937, Sid B. Redding, Clerk."

100

(Judgment, October 21, 1937.)

United States of America.

Eastern District of Arkansas.

— Division

Be it Remembered, That at a District Court of the United States of America, in and for the Western Division of the Eastern District of Arkansas, begun and holden on Monday,

the 18th day of October, Anno Domini, One Thousand, Nine Hundred and Thirty-seven, at the United States Court Room, in the City of Little Rock, Arkansas, the Honorable Charles B. Davis, Judge Designate, presiding, the following proceedings were had, to wit: On October 21, 1937:

Mrs. Julia Caroline Sponenbarger,  
No. 7984 vs.  
United States of America.

This cause having come on regularly for trial on the 10th day of May, 1937, before the Court under direction and authority of the Tucker Act, (Act. Mch. 3, 1887, U. S. C. Title 28); Lamar Williamson, Esq., appearing for the plaintiff, Joseph W. House, Esq., appearing as attorney for intervener, Receiver for Southeast Arkansas Levee District, Thompson, Mitchell, Thompson & Young appearing as attorneys for the intervener, the Mercantile Commerce Bank & Trust Company, Bryan, Cave, Williams & McPheeters appearing as attorneys for the intervener, Franklin American Trust Company and the St. Louis Union Trust Company, Hendrix Rowell, Esq., and DeWitt Poe, Esq., appearing as attorneys for intervener, Receiver for Cypress Creek Drainage District, and Hon. Fred A. Isgrig, United States District Attorney, and Hon. John C. Dyott, Special Assistant to the Attorney General, appearing as attorneys for the defendant, United States of America, and the trial having been proceeded with and oral and documentary evidence on behalf of the respective parties having been introduced and closed, and the cause having been submitted to the Court for its consideration and decision, after briefs and arguments of the respective parties had been submitted and considered, and the Court after due deliberation having rendered its decision and filed its findings of fact and conclusions of law, and ordered the judgment to be entered in accordance with said findings and the opinion of the Court rendered in writing:

Now, therefore, by virtue of the law, and by reason  
101 of the findings aforesaid, it is considered, ordered and adjudged by the Court that the plaintiff take nothing by this action and that the defendant go hence without delay, and that the defendant do have and recover of and from the plaintiff its legal and taxable cost in this suit expended.

102 (Motion for New Trial of Mercantile-Commerce Bank and Trust Company, et al.)

Come now Mercantile-Commerce Bank and Trust Company and Mercantile-Commerce National Bank in St. Louis

and move to set aside the judgment of the court rendered in the above matter and for a new trial and for ground of said motion state:

That the judgment of the court is based on certain erroneous findings and conclusions of the court, as expressed in the opinion of the court, and, among others, on the following erroneous findings:

### I.

The opinion speaks of movants herein and of others as "intervenor", but also states that they "were made parties upon motion of defendant." An intervenor is, 33 C. J. title "Intervenor",

"A person who voluntarily interposes in an action or other proceeding with the leave of court."

Movants and others brought in on motion of defendant by order of court without their consent are properly styled defendants and the point is important in connection with the details of the judgment.

### II.

The opinion of the court says, among other things:

"The Floodway Act created a board to adjust engineering differences between the adopted project and the plans suggested by the Mississippi River Commission, and to make recommendations to the President. The decision of the President on such matters was to be final. This decision was made on January 10, 1929, in a communication to the Secretary of War, in which he approved the construction of the levees in the Boeuf Floodway."

The facts with reference to the approval of the President are as follows:

There is a document dated August 13, 1928, the whole of which is as follows:

"August 13, 1928.

"The policy and method of dealing with the problem set out in the report, dated August 8, 1928, of the board provided for in section 1 of 'An Act for the control of floods on the Mississippi River and its tributaries, and for other purposes,' approved May 15, 1928, hereto annexed, are approved. The balance of the report is approved excepting and reserving for my future action those parts which con-

template the acquiring of rights in land for constructing spillways and floodways.

CALVIN COOLIDGE,  
President.

There is also the document of January 10, 1929, "quoted in footnote 2 to the opinion. As appears from the face of the documents, they are not addressed to the Secretary of War.

The first document constitutes full adoption by the President of the Floodway Plan, including the Boeuf River Spillway, reserving for future disposition only,

"the acquiring of rights in land for constructing spillways and floodways."

The document of January 10, 1929, recognized that the Boeuf Spillway was already adopted, did not purport to do anything more than decide the specific narrow question reserved in the document of August 13, 1928, and merely said:

"the construction of the protection levees in the Boeuf Basin, as provided for in the adopted project, is approved. Land for rights-of-way for these levees will be secured by condemnation as authorized by law . . ."

There is serious question whether "the acquiring of rights-of-way for land for constructing spillways and floodways" is one of the "engineering differences" which was left to the decision of the President and which consequently he was entitled to reserve in his statement of August 13, 1928, but, in any event, the statement of August 13, 1928, constituted the decision of the President as to the creation of the Boeuf Spillway, leaving open only the detail of the "acquiring of rights in land" for the construction of the protection levees.

The point about "acquiring of rights in land" related to whether or not the federal government or local interests should pay for those which had to be bought and the point had no direct reference to the establishment of spillways and floodways.

### III.

The opinion of the court says, among other things:

"The government did not proceed with the construction of the Boeuf Floodway on account of 'local opposition.'"



The authority for this statement is quoted in Note 4 of the opinion, which reads:

"All parts of the project works in the middle section, except the Boeuf Floodway and the raising of the main river levees adjacent to its head, have in general been completed. Because of local opposition the construction of the Boeuf Floodway levees has not been undertaken."

The statement relates to completion, not start of work. The fact not only is, as stated, that all work of construction in the middle section, including the Boeuf Floodway, had been completed, except with reference to the protection levees and the river levees adjacent to its head, but the construction of the protection levees themselves had gone to the point that condemnation suits had been filed. The fact properly stated, accordingly, is that the government did proceed with the construction of the Boeuf Floodway, but stopped, before completing the construction, at a stage which left the Boeuf Floodway open to all the dangers of a floodway and failed to give even the amount of protection prescribed by law. The fact that there is left temporarily, pursuant to statute, a somewhat longer fuse plug than is necessary or than was prescribed as a permanent construction, and the fact that the absence of the protection levees permits floods to extend over more area than was contemplated, does not lessen  
105 in the least the flood hazard in the Boeuf Floodway and does not lessen to any material extent the amount of damage that will be done by a flood. In general, the fact that the government has not completed its work is immaterial.

#### IV.

The opinion states in effect and then proceeds on the assumption that the Boeuf Floodway has been abandoned. The provisions of law quoted in the opinion, Note 7, as supporting the statement and assumption are:

"that the Boeuf Floodway authorized by the provisions adopted in the Flood Control Act of May 15, 1928, shall be abandoned as soon as the Eudora Floodway, provided for in Flood Control Committee Document No. 1, 74th Congress, 1st Session, is in operative condition and the back protection levee recommended in said document, extending north from the head of the Eudora Floodway shall have been constructed."

At the time of the trial, let alone at the time suit was filed, absolutely nothing had been done on the Eudora Floodway. It was to no extent in operative condition and the back protection levee referred to had not been constructed; construction had not started and it was not even decided that the Eudora Floodway would be adopted for, under provisions of the Act partly quoted in Note 7, the adoption of that floodway is dependent on the following proviso:

"Provided, that no money appropriated under the authority of Section 13 of this Act shall be expended upon the construction of the Eudora Floodway, the Morganza Floodway, the back protection levee extending north from the Eudora Floodway or the levees extending from the head of the Morganza Floodway to the head of and down the east bank of the Atchafalaya River to the intersection of said Morganza Floodway until 75 per centum of value of the flowage rights and rights-of-way for levee foundations, as estimated by the Chief of Engineers, shall have been acquired."

The court will remember that the government witnesses repeatedly developed that appraisers and buyers for the Eudora rights-of-way had not been appointed.

It is true that some place along the line the law has been violated, in that the government started but did not complete the Boeuf River project. Moreover, it amply appeared in the course of the trial that the reason was not local opposition but a War Department switch from the Jadwin Plan to the Markham Plan in advance of authorization by law. However, as stated, the Markham Plan, to the extent it is embodied in the Act of June 15, 1936, does not even purport to be a present abandonment of the Boeuf River Floodway. While the United States has violated the law in not proceeding with reasonable expedition with the completion of the Boeuf Floodway—whether its explanation be local opposition or whatnot—nevertheless the Boeuf Floodway is still in existence and its existence is recognized in the Act of June 15, 1936, in the statement that it "shall be abandoned" later on certain contingencies.

## V.

The opinion says:

"The plaintiff's land is also in the Eudora Floodway, but reliance is not placed upon that fact in this case."

As stated above, there is no Eudora Floodway, the Eudora Floodway had not even been proposed when this suit was filed, and the location of plaintiff's land with reference to

the proposed Eudora Floodway was not an issue in this case. Under the provisions of the law, noted above, there probably never will be a Eudora Floodway.

## VI.

The opinion says:

"During the progress of the execution of the flood control program, the government has undertaken to straighten the channel and increase its discharge capacity, by making a series of 'cut offs', thus eliminating some of the bends. . . .

The engineering witnesses at the trial were in accord on the fact that as a result of this program the flood level of the river in the vicinity of the Cypress Creek Gap was lowered during the flood of February, 1937. But there was disagreement among the engineers as to whether this effect was temporary or permanent, and as to whether this practice was sufficiently free from hazard as to be advisable."

107. No reference is made to the particular evidence which it is thought by the court sustains the last statement. The evidence of plaintiff's engineers was all to the effect that on past experience any beneficial result was only temporary and the cut offs would cause increased trouble until the river ultimately adjusted itself. The government engineers agreed that plaintiff's engineers were correct on the basis of past experience, but said that a new principle or a new practice had been discovered, which, if followed over the years in the future, would lead to a different result. This new principle or new practice the government engineers refused to disclose to plaintiff's engineers, so that plaintiff's engineers might take it into consideration. Not only did they refuse to disclose the new principle or new practice to plaintiff's engineers in advance of the trial, so that it might be given proper consideration, they also refused to disclose it to the court, saying it was not yet ready for publication; they hoped that authority to make it public would soon be given. No more astounding a position has ever been taken in the trial of a case. It is the supposition that the present government engineers are making their little contribution to flood control knowledge, as have innumerable of their predecessors in the past, but their attitude is the customary attitude of the inventor who claims to have discovered perpetual motion. However, even if their present discovery is really revolutionary, they have refused to disclose it to the court and consequently there is no competent evidence that the beneficial effect of the cut offs will be permanent. Admittedly, the beneficial effect depends on continuing work, not provided for.

## VII.

The opinion says:

"If experience in the carrying out of the project dictated that a system of cut off be adopted, with the view of improving the channel of the river, and increasing its discharge capacity, nothing can be more certain than authority so to do may be found in the Jadwin Plan."

108 The facts are that the Jadwin Plan definitely rejects levees high enough to contain the maximum floods of the rivers, it definitely rejects the reservoir plan and it definitely rejects a system of cut off. If the government afterwards should change its mind (it has not yet, notwithstanding the enthusiasm of the particular engineers the government put on the stand to contradict their former Chief, General Jadwin, for cut offs are yet experimental—see Note 8) and decide that the Jadwin Plan was wrong and that increased levees or reservoirs or cut offs are desirable and that floodways should be eliminated, that is the privilege of the government. There always were engineers within and without the War Department who differed from the Jadwin Plan with reference to those items. At the time the Jadwin Plan was adopted it stood to reason that the future would develop better methods of river control than had been known in the past and it may be that a system of cut off, modified from systems previously known, offers promise. While, as noted in Note 11, the plan itself leaves to the Chief of Engineers "the responsibility for the execution of the plan, the details of the design, and location of the engineering work", certainly the fundamental device of floodways cannot be eliminated under the Jadwin Plan and cut offs substituted. It is immaterial that improved methods may have been discovered since the taking of land for a floodway, in accordance with the Jadwin Plan. Certainly, such subsequent discoveries did not and could not prevent the collapse of the market, which followed the adoption of the Jadwin Plan and preceded the discoveries.

## VIII.

The opinion says:

"The nature of the flood control plan, and the progress that has been made in its execution, have been set out in some detail, because it is conceived that this case must turn upon the factual situation."

This statement is incorrect as a matter of law if by  
109 "factual situation" is meant that the court is permitted to judge by hindsight instead of by foresight.



The material question is the market reaction to the prospects of the future and not the accidental facts concerning subsequent floods in the relatively short interval to date. While extreme fears so far may not yet have been realized, they may be realized at any time in the future and, if they should never be realized because of subsequent developments of engineering science, that is immaterial. Using the Portsmouth Harbor cases as an illustration, ordnance and ammunition may be so improved in the future that all fear of a short burst will disappear and land fired over may become preferred for resort purposes because of the spectacle, but that will not alter the fact of a present taking, or the fact of present damage by the taking.

### IX.

The opinion states that a taking, as claimed by plaintiff, was effected by four specified acts. These movants claim that there were two additional acts of equal importance in connection with the taking, to-wit, (a) the proclamation of the President of August 13, 1928, whereby the Boeuf River Floodway was established, and (b) the starting of condemnation suits for the location of the protection levees. The court apparently overlooks the fact that the condemnation suits were started.

### X.

The opinion says:

"The landowners, prior to 1928, had no right to elevate the established grade."

If these movants understand this sentence it expresses a fundamental and complete misunderstanding of the situation. In 1914 the Mississippi River Commission, a purely advisory body without the powers given the War Department in the Flood Control Act, had established a levee grade and section which it had determined was sufficient to contain the maximum floods and which, as a minimum, it set as a goal to which to bring all levees, but there was no prohibition against lower levees or higher levees or levees of less or greater section and consequent strength. For the first time in history, in the Jadwin Plan, the right was taken from landowners to build such levees as they saw fit and the taking was only in connection with the fuse plug sections.

### XI.

The opinion says:

"There is nothing in the Act that restricts the privilege of property owners to participate in a 'flood fight' by supporting the river front levee, when it is endangered."

There is nothing in the Act which would prevent them from maintaining the levee at the 1914 grade and section, but they go to the penitentiary if they raise the grade or enlarge the section. In the analogous Birds Point Fuse Plug the government blew up the levee last year before the river reached the proper crest of the levee and, if the court will here use the formula which it used before (which these movants believe is not a correct formula in either place), "that this case must turn upon the factual situation", the Birds Point Act Shows what the government will do to the Boeuf Fuse Plug in a flood fight when, in the judgment of the War Department, the flood really threatens—in defiance of the right of the landowners to maintain the levee.

## XII.

The opinion says:

"The act of the government in raising the other levees in the vicinity to the 1928 grade, and leaving the prolonged fuse plug section at the 1914 grade, is relied upon as constituting the taking of plaintiff's property."

111. The very essence of the Jadwin Plan is that the fuse plug section shall not merely be left, but shall be forever limited not to exceed the 1914 grade and section on penalty of the penitentiary. See Note 1 for one of the milder statements in the Jadwin Plan to this effect. It is not the leaving of the levee but the prohibition against raising it to equal the grade and section everywhere else established that is relied on as constituting the taking of plaintiff's property—"a fuse plug section \* \* \* must be kept at its present strength (i. e. not in excess of its present strength) and at its present grade, viz (at least) 3 feet below the new levee grade."

## XIII.

The opinion says:

"So the project, in the present stage of execution, is not effective to the end-designed, and has placed no burden upon plaintiff's land that is not equally shared by all other similar land in that vicinity."

It is true that the work is at present incomplete, but it is not true that the work so far done makes no difference. The point however, is that the government took the land when it started work and the particular stage of progress that may have been attained by the time the suit was tried, or that had been attained at the time the suit was filed, is immaterial and it is immaterial if the work is never completed, whether because

112 the government changes its mind or because Congress refuses to appropriate the necessary money. Further, the statement fundamentally mistakes the situation. The fuse plug was sufficient even in 1927 in the sense that it was not breached. The levee across the river went. The raising of the levee across the river, coupled with the prohibition of any raising or strengthening of the fuse plug insures that that will not happen again. The purpose of the Boeuf Floodway is not to protect land for a few miles on either side of the proposed protection levees but is to protect the land across the river and all up and down the river. Granted that the Boeuf Floodway is not confined by protection levees, that is of minor and only partial moment.

## XIV.

The opinion says:

"\* \* \* there has been no over topping or crevassing of the fuse plug section of the river front levee since the passage of the Act in question."

This is wholly immaterial. For that matter there was not in 1927. The point is that any future break is forced at that point—a wholly artificial situation on the basis of all past experience. The plan may be wise, though artificial, but those benefitted should pay the cost.

THOMPSON, MITCHELL,  
THOMPSON & YOUNG,

By Fred Armstrong, Attorneys for Plaintiff.

Endorsed: "Filed Oct. 29, 1937, Sid B. Redding, Clerk."

### 113 Separate Motion of St. Louis Union Trust Company For A New Trial.

Now comes the St. Louis Union Trust Company and moves the Court to set aside the judgment heretofore rendered and to grant it a new trial and, as grounds therefore, states:

1. The Court erred in finding and in holding that the Government did not proceed with the construction of the Boeuf Floodway.

2. The Court erred in finding and declaring as a matter of law that there had not been a taking and damaging of plaintiff's lands.

3. The Court erred in refusing to make the findings of fact and the conclusions of law requested by plaintiff.

4. The Court erred in making the findings of fact and conclusions of law requested by the defendant.

**BRYAN, WILLIAMS, CAVE & Mc-PHEETERS,**

Attorneys for Defendant St. Louis Trust Company.

Endorsed: "Filed November 1, 1937 Sid B. Redding, Clerk, U. S. District Court."

114 (Order of Submission of Motion for New Trial of Mercantile-Commerce Bank and Trust Company, et al.)

In The United States District Court for The Western Division of The Eastern District of Arkansas.

Mrs. Julia Caroline Sponenbarger, Et Al, Plaintiffs,  
No. 7984. vs.

The United States of America, Defendant.

Now on this 23 day of December, 1937, pursuant to correspondence addressed to the undersigned, it is ordered that the motion of Mercantile-Commerce Bank and Trust Co., and Mercantile Commerce National Bank in St. Louis for new trial in this cause be and same is submitted to the Court upon memorandum brief and argument by movant.

**CHARLES B. DAVIS,**

United States District Judge.

Endorsed: "Filed Dec. 23, 1937, Sid B. Redding, Clerk."

115 (Opinion of District Court on overruling of Motion for New Trial of Mercantile-Commerce Bank and Trust Company, et al.)

In The United States District Court for The Western Division of The Eastern District of Arkansas.

Mrs. Julia Caroline Sponenbarger; Grady Miller as Receiver for the Southeast Arkansas Levee District; Alex H. Rowell and William R. Humphrey, as Receivers for the Cypress Creek Drainage District; Cypress Creek Drainage District; Mercantile-Commerce Bank and Trust Company and Mercantile Commerce National Bank in St. Louis; and St. Louis Trust Company, Plaintiffs,

No. 7984. vs.

The United States of America, Defendant.



The first specification of the Motion for New Trial relates to the designation of certain of the parties and the form of the judgment.

This action was instituted by Julia Caroline Sponenbarger, as the sole plaintiff. The defendant filed a motion alleging that parties certain and uncertain asserted some lien or claim to the land described in petition, and prayed that an order be entered requiring such parties to be joined as plaintiffs in the action. The Court sustained the motion. In response to the said order the following parties entered their appearance and filed pleadings in the cause:

Mercantile-Commerce Bank and Trust Company, and Mercantile Commerce National Bank in St. Louis, jointly.

St. Louis Union Trust Company, individually, and in its own right, and as trustee for bondholders.

Alex H. Rowell and William R. Humphray, as Receivers of the Cypress Creek Drainage District; the Receivers being discharged, the District entered its appearance.

Grady Miller, as Receiver of the Southeast Arkansas Levee District.

The order of Court directed that these parties become parties plaintiff. They entered their appearance, aligned themselves with the original plaintiff, and some or all of them adopted said plaintiff's petition. They participated in the trial, and submitted the case on the brief and argument of the original plaintiff.

In its opinion, the Court referred to these parties as interveners, as they had, at times, been designated during the trial, to distinguish them from the original plaintiff  
116 in the case. This was an incorrect designation. They were made parties plaintiff by order of the Court, by their respective interests and by their manner of participation in the cause. The opinion is modified to this extent.

The Court reached the conclusion that the original plaintiff was not entitled to recover. Consequently, there was no occasion to make any finding as to whether, or to what extent, the additional parties plaintiff had any claim or lien on the land which was mentioned in the petition. This does not negative the idea that the parties brought into the case by defendant's motion are bound by the judgment.

The judgment entered by the Clerk designated the additional parties as "interveners" following the language of the Court in its opinion filed and did not expressly dispose

of the case as to these additional parties. To correct these errors and mistakes, the Court, on its own motion, doth order that the judgment entered October 21, 1937, be and is hereby amended, nunc pro tunc, as of October 21, 1937, in accordance with amended judgment herewith.

Our view of the other points raised in the motion for New Trial have been heretofore expressed in the opinion on file.

The Motion for New Trial is overruled.

CHARLES B. DAVIS,  
United States District Judge.

Endorsed: "Filed Dec. 23, 1937, Sid B. Redding, Clerk."

117 (Order overruling Motion for New Trial of St. Louis Union Trust Company.)

In The United States District Court for The Western Division of The Eastern District of Arkansas.

Mrs. Julia Caroline Sponenbarger, Et Al, Plaintiffs,  
No. 7984. vs.

The United States of America, Defendant.

With the consent of movant, the Motion of the St. Louis Union Trust Company for a New Trial submitted to the Court:

Motion of the St. Louis Union Trust Company for a New Trial overruled.

CHARLES B. DAVIS,  
United States District Judge.

Endorsed: "Filed Dec. 23, 1937, Sid B. Redding, Clerk."

118 (Amended Judgment, December 23, 1937.)

United States of America Eastern District of Arkansas, Western Division.

Be It Remembered, That at a District Court of the United States of America, in and for the Western Division of the Eastern District of Arkansas, begun and holden on Monday, the 18th day of October Anno Domini, One Thousand, Nine Hundred and thirty-seven at the United States Court Room, in the City of Little Rock, Arkansas, the Honorable Charles B. Davis, Judge designate, presiding, the following proceedings were had, to-wit: On Dec. 23, 1937:

119 Mrs. Julia Caroline Sponenbarger; Grady Miller as Receiver for the Southeast Arkansas Levee District; Alex H. Rowell and William R. Humphrey, as Receivers for the Cypress Creek Drainage District; Cypress Creek Drainage District; Mercantile-Commerce Bank and Trust Company and Mercantile-Commerce National Bank in St. Louis; and St. Louis Union Trust Company, Plaintiffs,

No. 7984. vs.

The United States of America, Defendant.

Now on this 23rd day of December, 1937, in order to correct certain errors and mistakes in judgment heretofore entered herein on October 21, 1937, on the Court's own motion, it is hereby Ordered that the aforesaid judgment be amended, nunc pro tunc, as of October 21, 1937, to read as follows:

This cause having come on for trial on the 10th day of May, 1937, before the Court under direction and authority of the Tucker Act (Act of March 3, 1887, 28 USCA 41 (20) ), there appeared the parties plaintiff, Julia Caroline Sponenbarger, by Lamar Williamson, Esq., and E. E. Hopson, Esq., her attorneys; Grady Miller, Receiver for the Southeast Arkansas Levee District, by Joseph W. House, Esq., his attorney; Mercantile-Commerce Bank and Trust Company and Mercantile Commerce National Bank in St. Louis by Fred Armstrong, Esq., of Thompson, Mitchell, Thompson and Young, their attorneys; St. Louis Union Trust Company by Henry Davis, Esq., of Bryan, Williams, Cave and McPheeters, its attorneys; Cypress Creek Drainage District and Alex H. Rowell and William R. Humphrey, Receivers for the Cypress Creek Drainage District by Hendrix Rowell, Esq., and DeWitt Poe, Esq., their attorneys; and party defendant, The United States of America by Fred A. Isgrig, Esq., United States Attorney and John C. Dyott, Esq., Special Assistant to the Attorney General: whereupon, trial of cause before the Court being commenced and concluded, and the issues herein joined, argued and submitted to the Court on briefs; the Court, having duly considered the said issues, doth

120 file herein its opinion and findings of fact and conclusions of law, finding the said issues herein in favor of the defendant and against the plaintiffs.

It is therefore, pursuant to the aforesaid findings of fact and conclusions of law and opinion of this Court, Ordered and Adjudged that plaintiffs, Julia Caroline Sponenbarger; Grady Miller as Receiver for the Southeast Arkansas Levee District; Alex H. Rowell and William R. Humphrey, as Re-

ceivers for the Cypress Creek Drainage District; Cypress Creek Drainage District; Mercantile-Commerce Bank and Trust Company and Mercantile Commerce National Bank in St. Louis and St. Louis Union Trust Company take nothing by their suit in this behalf, and that the United States of America, defendant, go hence without day and have and recover of said plaintiffs their costs and charges herein expended, for all of which judgment costs and charges let execution issue upon Praecipe filed therefor by said defendant.

CHARLES B. DAVIS,  
United States District Judge.

121 (Notice of Appeal and Acknowledgment of Service.)

In the United States District Court For the Western  
Division of the Eastern District of Arkansas.

Julia Caroline Sponenbarger, Plaintiff,  
No. 7984. vs. At Law.  
United States of America, Defendant.

Notice of appeal to the defendant, United States of America, and to the honorable Fred A. Isgrig, United States District Attorney, the attorney of record for defendant:

You are hereby notified that the plaintiff, Julia Caroline Sponenbarger, intends to, will, and does hereby appeal from the Judgment of the Court in the above styled cause to the United States Circuit Court of Appeals for the Eighth Circuit.

And there is herewith handed you a copy of the Petition for Appeal, Assignment of Errors, requested form of Order Allowing Appeal, Appeal Bond, Bill of Exceptions including plaintiff's Statement of the Evidence, Citation, and Praecipe as by law provided.

You will take due notice and govern yourself accordingly.

JULIA CAROLINE SPONENBARGER,

Plaintiff,

By E. E. Hopson, McGehee, Arkansas, and  
By Lamar Williamson,

Monticello, Arkansas.  
Attorneys for the Plaintiff.



Service of the foregoing Notice of Appeal and of each of the documents therein referred to is hereby acknowledged this 15 day of Nov., A. D., 1937.

FRED A. ISGRIG,  
United States District Attorney,  
Attorney for the Defendant, the  
United States of America.

Endorsed: "Filed Nov. 29, 1937. Sid B. Redding, Clerk."

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### Petition For Appeal.

In the United States District Court For the Western  
Division of the Eastern District of Arkansas.

Mrs. Julia Caroline Sponenbarger; Grady Miller as Receiver for the Southeast Arkansas Levee District; Alex H. Rowell and William R. Humphrey, as Receivers for the Cypress Creek Drainage District; Cypress Creek Drainage District; Mercantile-Commerce Bank and Trust Company and Mercantile Commerce National Bank in St. Louis; and St. Louis Union Trust Company, Appellants,

No. 7984. vs.

The United States of America, Appellee.

The above named appellants, feeling aggrieved by the Findings of Fact and Conclusions of Law and the Judgment entered thereon in the above styled action on the 21st day of October, A. D., 1937, and the Amended Judgment rendered the 23rd day of December, 1937, hereby appeal from said Findings of Fact and Conclusions of Law and Judgments to the United States Circuit Court of Appeals for the Eighth Circuit for the correction of the errors more particularly recited in the Assignment of Errors filed by the original plaintiff Julia Caroline Sponenbarger herein on November 29, 1937, which Assignment of Errors are hereby adopted by each and all of the above named appellants.

Wherefore, said appellants pray that their appeal be allowed, that a Citation be issued in accordance with law, and that a properly authenticated transcript of the record, proceedings, and exhibits of the trial be forwarded to the United States Circuit Court of Appeals for the Eighth Circuit at St. Louis, Missouri.

Your petitioners further pray that this Court, in its order allowing the appeal, fix the amount of bond which they shall

file to pay the costs of this appeal, conditioned as provided by law.

**JULIA CAROLINE SPONENBARGER,**  
Plaintiff and Appellant,  
By E. E. Hopson, McGehee, Arkansas, and  
By Lamar Williamson,  
Monticello, Arkansas,  
her attorneys.

**GRADY MILLER, As Receiver For the**  
Southeast Arkansas Levée District,  
By Joseph W. House,  
Little Rock, Arkansas, and  
By Lamar Williamson,  
Monticello, Arkansas,  
his attorneys.

**ALEX H. ROWELL and**  
**WILLIAM R. HUMPHREY, As Re-**  
ceivers For The Cypress Creek Drain-  
age, District,  
By DeWitt Poe, McGehee, Arkansas, and  
By Lamar Williamson,  
Monticello, Arkansas, and  
By Hendrix Rowell, Pine Bluff, Arkansas,  
their attorneys.

**CYPRESS CREEK DRAINAGE**  
**DISTRICT,**  
By DeWitt Poe, McGehee, Arkansas, and  
By Lamar Williamson,  
Monticello, Arkansas,  
Attorneys.

**MERCANTILE-COMMERCE BANK**  
**AND TRUST COMPANY, and MER-**  
**CANTILE-COMMERCE NATIONAL**  
**BANK IN ST. LOUIS,**  
By Fred Armstrong, Atty. of Thompson  
Mitchell, Thompson & Young, St.  
Louis, Missouri.

**ST. LOUIS UNION TRUST COM-**  
**PANY, Individually and In Its Own**  
Right, and As Trustee For Bond-  
holders In A Pledge and Mortgage  
Executed By The Cypress Creek  
Drainage District,  
By Henry Davis, Atty. of Bryan, Williams  
Cave & McPheeters, St. Louis, Missouri.

ST. LOUIS UNION TRUST COMPANY, Individually and In Its Own Right, and As Trustee For Bondholders In A Pledge and Mortgage Executed by the Southeast Arkansas Levée District,

By Henry Davis, Atty., of Bryan, Williams, Cave & McPheeters, St. Louis, Missouri.

Endorsed: "Filed Jan. 7, 1938, Sid B. Redding, Clerk."

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Assignment of Errors.

Now comes the plaintiff, Julia Caroline Sponenbarger, the appellant herein, in connection with and as a part of her Petition for Appeal, and files the following Assignment of Errors upon which she will rely on appeal to the United States Circuit Court of Appeals for the Eighth Circuit, to-wit:

1. The Court erred in adjudging that the plaintiff take nothing by her action.
2. The judgment of the Court is contrary to the law.
3. There is no substantial evidence to support the judgment of the Court.
4. The judgment of the Court is contrary to the law and the evidence.
5. The Court erred in refusing to adopt plaintiff's request for Finding of Fact numbered 1.
6. The Court erred in refusing to adopt plaintiff's request for Finding of Fact numbered 2.
7. The Court erred in refusing to adopt plaintiff's request for Finding of Fact numbered 3.
8. The Court erred in refusing to adopt plaintiff's request for Finding of Fact numbered 4.
9. The Court erred in refusing to adopt plaintiff's request for Finding of Fact numbered 5.
10. The Court erred in refusing to adopt plaintiff's request for Finding of Fact numbered 6.
11. The Court erred in refusing to adopt plaintiff's request for Finding of Fact numbered 7.

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12. The Court erred in refusing to adopt plaintiff's request for Finding of Fact numbered 8.

13. The Court erred in refusing to adopt plaintiff's request for Finding of Fact numbered 9.

14. The Court erred in refusing to adopt plaintiff's request for Finding of Fact numbered 10.

15. The Court erred in refusing to adopt plaintiff's request for Finding of Fact numbered 11.

16. The Court erred in refusing to adopt plaintiff's request for Finding of Fact numbered 12.

17. The Court erred in refusing to adopt plaintiff's request for Finding of Fact numbered 13.

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125a 27. The Court erred in refusing to adopt plaintiff's request for Finding of Fact numbered 23.

28. The Court erred in refusing to adopt plaintiff's request for Finding of Fact numbered 24.

29. The Court erred in refusing to adopt plaintiff's request for Finding of Fact numbered 25.



30. The Court erred in refusing to adopt plaintiff's request for Finding of Fact numbered 26.

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104. The Court erred in refusing to adopt plaintiff's request for Finding of Fact numbered 100.

105. The Court erred in refusing to adopt plaintiff's request for Finding of Fact numbered 101.



106. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 1.
- 130 107. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 2.
108. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 3.
109. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 4.
110. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 5.
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112. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 7.
113. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 8.
114. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 9.
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116. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 11.
117. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 12.
118. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 13.
119. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 14.
120. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 15.
121. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 16.
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- 131 123. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 18.
124. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 19.

125. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 20.

126. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 21.

127. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 22.

128. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 23.

129. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 24.

130. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 25.

131. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 26.

132. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 27.

133. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 28.

134. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 29.

135. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 30.

136. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 31.

137. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 32.

138. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 33.

139. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 34.

140. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 35.

141. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 36.

142. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 37.

143. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 38.

144. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 39.

145. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 40.

146. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 41.

147. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 42.

148. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 43.

149. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 44.

150. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 45.

151. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 46.

152. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 47.

153. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 48.

154. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 49.

155. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 50.

156. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 51.

157. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 52.

158. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 53.

159. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 54.

160. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 55.

161. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 56.

162. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 57.

163. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 58.

164. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 59.

165. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 60.

166. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 61.

167. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 62.

168. The Court erred in adopting each of the separate requests of the defendant for Findings of Fact inconsistent with the Findings of Fact requested by the plaintiff.

169. The Court erred in adopting defendant's request for Finding of Fact numbered 4.

134 170. The Court erred in adopting defendant's request for Finding of Fact numbered 20.

171. The Court erred in adopting defendant's request for Finding of Fact numbered 22.

172. The Court erred in adopting defendant's request for Finding of Fact numbered 25.

173. The Court erred in adopting defendant's request for Finding of Fact numbered 26.

174. The Court erred in adopting defendant's request for Finding of Fact numbered 27.

175. The Court erred in adopting defendant's request for Finding of Fact numbered 29.

176. The Court erred in adopting defendant's request for Finding of Fact numbered 30.

177. The Court erred in adopting defendant's request for Finding of Fact numbered 31.

178. The Court erred in adopting defendant's request for Finding of Fact numbered 32.

179. The Court erred in adopting defendant's request for Finding of Fact numbered 34.

180. The Court erred in adopting defendant's request for

181. The Court erred in adopting defendant's request for Finding of Fact numbered 37.

182. The Court erred in adopting defendant's request for Finding of Fact numbered 38.

183. The Court erred in adopting defendant's request for Finding of Fact numbered 39.

184. The Court erred in adopting defendant's request for Finding of Fact numbered 40.

185. The Court erred in adopting defendant's request for Finding of Fact numbered 41.

135 186. The Court erred in adopting defendant's request for Finding of Fact numbered 42.

187. The Court erred in adopting defendant's request for Finding of Fact numbered 43.

188. The Court erred in adopting defendant's request for Finding of Fact numbered 44.

189. The Court erred in adopting defendant's request for Finding of Fact numbered 45.

190. The Court erred in adopting defendant's request for Finding of Fact numbered 47.

191. The Court erred in adopting defendant's request for Finding of Fact numbered 48.

192. The Court erred in adopting defendant's request for Conclusion of Law numbered 1.

193. The Court erred in adopting defendant's request for Conclusion of Law numbered 2.

194. The Court erred in adopting defendant's request for Conclusion of Law numbered 3.

195. The Court erred in adopting defendant's request for Conclusion of Law numbered 4.

196. The Court erred in adopting defendant's request for Conclusion of Law numbered 5.

197. The Court erred in adopting defendant's request for Conclusion of Law numbered 6.

198. The Court erred in adopting defendant's request for Conclusion of Law numbered 7.

199. The Court erred in adopting defendant's request for



200. The Court erred in adopting defendant's request for Conclusion of Law numbered 9.

201. The Court erred in adopting defendant's request for Conclusion of Law numbered 10.

136 202. The Court erred in adopting defendant's request for Conclusion of Law numbered 11.

203. The Court erred in adopting defendant's request for Conclusion of Law numbered 12.

204. The Court erred in adopting defendant's request for Conclusion of Law numbered 13.

205. The Court erred in adopting defendant's request for Conclusion of Law numbered 14.

206. The Court erred in adopting defendant's request for Conclusion of Law numbered 15.

207. The Court erred in adopting defendant's request for Conclusion of Law numbered 16.

208. The Court erred in adopting defendant's request for Conclusion of Law numbered 17.

209. The Court erred in adopting defendant's request for Conclusion of Law numbered 18.

210. The Court erred in adopting defendant's request for Conclusion of Law numbered 19.

211. The Court erred in adopting defendant's request for Conclusion of Law numbered 20.

212. The Court erred in adopting defendant's request for Conclusion of Law numbered 21.

213. The Court erred in adopting defendant's request for Conclusion of Law numbered 22.

214. The Court erred in adopting defendant's request for Conclusion of Law numbered 23.

215. The Court erred in sustaining the defendant's motion to make additional parties plaintiff.

216. The Court erred in making the Southeast Arkansas Levee District a party to the suit.

217. The Court erred in making Grady Miller as Receiver for the Southeast Arkansas Levee District a party to the suit.

137 218. The Court erred in making the Cypress Creek Drainage District a party to the suit.

219. The Court erred in making the Receivers for the Cypress Creek Drainage District parties to the suit.

220. The Court erred in making Trustees for the bondholders of the Cypress Creek Drainage District and Trustees for the bondholders of the Southeast Arkansas Levee District parties to the suit.

221. The Court erred in holding that "Congress adopted the recommendations of the Chief of Engineers by the passage of the Overton Bill, approved June 15, 1936, 33 U. S. C. A. 702a-1 to 702a-10," inclusive, whereas Congress modified and amended the recommendations of the Chief of Engineers as printed in House Committee on Flood Control Document numbered 1, 74th Congress, 1st Session, and adopted the recommendations of the Chief of Engineers "as so modified."

222. The Court erred in holding that the Boeuf Floodway, as authorized by the Flood Control Act of May 15, 1928, has been abandoned. On the contrary, the Flood Control Act of June 15, 1936, expressly recognizes the continued existence of the Boeuf Floodway for an indefinite time in the future.

223. The Court erred in admitting over the objections and exceptions of the plaintiff evidence relative to the provisions of the Flood Control Act of June 15, 1936, and of the plans authorized or contemplated thereby.

224. The Court erred in admitting, over the objections and exceptions of plaintiff, evidence of cut-offs which have been constructed in the Mississippi River since the alleged taking of plaintiff's property.

225. The Court erred in admitting, over the objections and exceptions of plaintiff, evidence relating to the effect of cut offs in the Mississippi River planned and constructed since the filing of plaintiff's suit.

138 226. The Court erred in referring in the opinion of the Court to the cut-off program.

227. Notwithstanding the Court in its opinion correctly declared: "It must be clear that the original flood control plan did not essentially have as its basis a program of channel straightening by means of cut-offs," the Court erred in further inconsistently stating in its opinion: "If experience in the carrying out of the project dictated that a system of cut-off be adopted with the view of improving the channel

of the river, and increasing its discharge capacity, nothing can be more certain than authority so to do may be found in the Jadwin Plan."

228. The Court erred in stating in its opinion: "The plan adopted was only in outline."

229. The Court erred in stating in its opinion as being applicable to the facts involved in the case at bar: "In order to create an enforceable liability against the Government, it is, at least, necessary that the overflow be the direct result of the structure, and constitute an actual, permanent invasion of the land, amounting to an appropriation of and not merely an injury to the property."

230. The Court erred in declaring as law applicable to this case: "Action on the part of the Government, not directly encroaching upon private property, but which imposes a temporary, occasional, or incidental injury, and impairs its use is regarded as a consequential damage, and does not amount to a taking."

231. The Court erred in declaring as a matter of law applicable in the instant case: "The landowners, prior to 1928, had no right to elevate the established grade" of the fuse plug levee.

232. The Court erred in declaring as a Conclusion of Law that it is immaterial whether or not the property owners have the legal right to raise the elevation of the fuse plug levee during a flood fight, and in stating in the opinion: "But 139. even if it were otherwise, that would not give rise to the contingency out of which plaintiff would become entitled to the relief sought in this case."

233. The Court erred in stating in the opinion: "Consequently, that floodway (Boeuf Floodway) is not now and never has been in an operative condition."

234. The Court erred in holding in its opinion that: "The project, in the present stage of execution, is not effective to the end designed."

235. The Court erred in holding that: "The project, in the present stage of execution, \* \* \* has placed no burden upon plaintiff's land that is not equally shared by all other similar land in that vicinity," meaning lands in that vicinity outside of the Boeuf Floodway.

236. The Court erred in holding in its opinion: "No actual entry of any kind or character has been made thereon," meaning plaintiff's property.

237. The Court erred in holding in its opinion that: "No right acquired or sought to reduce this protection," meaning that the defendant has neither acquired any right to reduce the protection of the plaintiff's property against the flood menace of the Mississippi River, and that the defendant has not sought to reduce the protection of plaintiff's property from flood waters diverted from the main channel of the Mississippi River.

238. The Court erred in holding in its opinion that: "It cannot be successfully contended that plaintiff's land has been appropriated by the defendant, thereby giving rise to an implied contract to compensate the owner."

239. The Court erred in its opinion by directing "that judgment be awarded defendant."

Wherefore, the plaintiff and appellant prays that the judgment in this cause be reversed, and that the cause be  
140 remanded with instructions to the trial court as to further proceeding herein, and for such other and further general, legal and equitable relief to which the plaintiff may be entitled.

JULIA CAROLINE SPONENBARGER,  
Plaintiff and Appellant.  
By Lamar Williamson as her Attorney  
of Record.

Endorsed: "Filed Nov. 29, 1937, Sid B. Redding, Clerk."

141 Order Allowing Appeal.

In The United States District Court for The Western  
Division of The Eastern District of Arkan-  
sas.

Mrs. Julia Caroline Sponenbarger; Grady Miller as Receiver for the Southeast Arkansas Levee District; Alex H. Rowell and William R. Humphrey, as Receivers for the Cypress Creek Drainage District; Cypress Creek Drainage District; Mercantile-Commerce Bank and Trust Company and Mercantile-Commerce National Bank in St. Louis; and St. Louis Union Trust Company, Appellants,

No. 7984. vs.

The United States of America, Appellee.

The plaintiffs in the above entitled action, Julia Caroline Sponenbarger, Grady Miller as Receiver for the Southeast

Arkansas Levee District; Alex H. Rowell and William R. Humphrey, as Receivers for the Cypress Creek Drainage District; Cypress Creek Drainage District; Mercantile-Commerce Bank and Trust Company and Mercantile Commerce National Bank in St. Louis; and St. Louis Union Trust Company, having filed herein their Petition for Appeal from the Findings of Fact and Conclusions of Law and Judgment entered thereon on the 21st day of October, A. D. 1937, and the Amended Judgment rendered nunc pro tunc December 23, 1937:

It is ordered and adjudged that an appeal to the United States Circuit Court of Appeals for the Eighth Circuit from the Findings of Fact and Conclusions of Law and Judgments heretofore entered herein be, and the same is hereby allowed, and that a certified transcript of the record be forwarded to the United States Circuit Court of Appeals for the Eighth Circuit at St. Louis, Missouri, as by law and the rules of the Court prescribed.

It is further ordered that appellants file a bond in the amount of \$500.00 to pay the costs of this appeal as by law and the rules of the Court provided.

Done and ordered of record this 6 day of January A. D. 1938.

CHARLES B. DAVIS,  
Charles B. Davis, United States  
District Judge.

Endorsed: "Filed Jan. 7, 1938, Sid B. Redding, Clerk."

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(Bond on Appeal.)

Know All Men By These Presents:

That we, Julia Caroline Spokenbarger, Grady Miller as Receiver for the Southeast Arkansas Levee District, Alex H. Rowell and William R. Humphrey, as Receivers for the Cypress Creek Drainage District, Cypress Creek Drainage District, Mercantile-Commerce Bank and Trust Company and Mercantile-Commerce National Bank in St. Louis, and St. Louis Union Trust Company, as principals, and Hartford Accident and Indemnity Company of Hartford, Connecticut, as surety, are held and firmly bound unto the above named defendant in the sum of Five Hundred Dollars (\$500) to which payment, well and truly to be made, we bind ourselves jointly and severally, our heirs, executors, successors, representatives and assigns, respectively, firmly by these presents.



Whereas, the above named Julia Caroline Sponenbarger, Grady Miller as Receiver for the Southeast Arkansas Levee District, Alex H. Rowell and William R. Humphrey, as Receivers for the Cypress Creek Drainage District; Cypress Creek Drainage District, Mercantile-Commerce Bank and Trust Company and Mercantile-Commerce National Bank in St. Louis, and St. Louis Union Trust Company, have prosecuted their appeal to the United States Circuit Court of Appeals, for the Eighth Circuit, to reverse the Findings of Fact and Conclusions of Law and the Judgment entered thereon in said above entitled cause on the 21st day of October, A. D., 1937; with Amended Judgment rendered nunc pro tunc December 23, 1937:

Now, Therefore, the condition of this obligation is such that if the above named appellants, Julia Caroline Sponenbarger, Grady Miller as Receiver for the Southeast Arkansas Levee District, Alex H. Rowell and William R. Humphrey, as Receivers for the Cypress Creek Drainage District, Cypress Creek Drainage District, Mercantile-Commerce Bank and Trust Company and Mercantile-Commerce National Bank in St. Louis, and St. Louis Union Trust Company, shall prosecute their appeal to effect and answer all costs if they fail to make good their pleas, then this obligation to be void; otherwise to remain in full force and effect.

Signed and sealed and dated this 4th day of January, A. D., 1937.

**JULIA CAROLINE SPONENBARGER,**  
Plaintiff and Appellant.

By Lamar Williamson,  
Monticello, Arkansas, and  
By E. E. Hopson, McGehee, Arkansas,  
Her Agents and Attorneys.

**GRADY MILLER** as Receiver for  
the Southeast Arkansas Levee Dis-  
trict,  
By Joseph W. House,  
Little Rock, Arkansas, and  
By Lamar Williamson,  
Monticello, Arkansas,  
His Attorneys.

**ALEX H. ROWELL**, and  
**WILLIAM R. HUMPHREY** as Re-  
ceivers for the Cypress Creek Drain-  
age District,

By DeWitt Poe, McGehee, Arkansas, and  
By Lamar Williamson,

Monticello, Arkansas, and  
By Hendrix Rowell, Pine Bluff, Arkansas,  
Their Attorneys.

**CYPRESS CREEK DRAINAGE  
DISTRICT,**

By DeWitt Poe, McGehee, Arkansas, and  
By Lamar Williamson,

Monticello, Arkansas.  
Its Attorneys.

**MERCANTILE-COMMERCE BANK  
AND TRUST COMPANY and  
MERCANTILE-COMMERCE NA-  
TIONAL BANK IN ST. LOUIS,**

By Fred Armstrong, Attorney, of Thomp-  
son, Mitchell, Thompson & Young,  
St. Louis, Missouri.

**ST. LOUIS UNION TRUST COM-  
PANY, Individually and in Its  
Own Right, and As Trustee for  
Bondholders in a Pledge and Mort-  
gage Executed by the Cypress  
Creek Drainage District,**

By Henry Davis, Attorney of Bryan, Wil-  
liams, Cave & McPheeters, St. Louis,  
Missouri.

**ST. LOUIS UNION TRUST COM-  
PANY, Individually and in Its  
Own Right, and As Trustee for  
Bondholders in a Pledge and Mort-  
gage Executed by the Southeast  
Arkansas Levee District,**

By Henry Davis, Attorney of Bryan, Wil-  
liams, Cave & McPheeters, St. Louis,  
Missouri.

**HARTFORD ACCIDENT AND IN-  
DEMNITY COMPANY, of Hart-  
ford, Connecticut, as Surety,**

By (Names not legible),  
Attorney-in-Fact & Resident Agent.

Approved: January 6, 1938.

**CHARLES B. DAVIS,**  
United States District Judge.

Endorsed: "Filed Jan. 7, 1938, Sid. B. Redding Clerk."

## Bill of Exceptions.

(Filed January 10, 1938.)

In the United States District Court for the Western Division of the Eastern District of Arkansas.

Mrs. Julia Caroline Sponenbarger; Grady Miller as Receiver for the Southeast Arkansas Levee District; Alex H. Rowell and William R. Humphrey, as Receivers for the Cypress Creek Drainage District; Cypress Creek Drainage District; Mercantile-Commerce Bank and Trust Company and Mercantile-Commerce National Bank in St. Louis; and St. Louis Union Trust Company, Appellants,

No. 7984. vs.

The United States of America, Appellee.

Be It Remembered, That on this the 10th day of May, 1937, his cause came on to be heard before the Hon. Charles B. Davis, Judge of the United States District Court for the Eastern District of Missouri, sitting by special assignment, the cause being heard under direction and authority of the Tucker Act (Act of March 3, 1887, Title 28 U. S. C. A., Sec. 1 (20)), the plaintiff Julia Caroline Sponenbarger appearing in person and by her attorneys Lamar Williamson of Monticello, Arkansas, and E. E. Hopson of McGehee, Arkansas; the plaintiff Grady Miller as Receiver for the Southeast Arkansas Levee District appearing by his attorneys Mr. Joseph W. House of House, Moses & Holmes, Little Rock, Arkansas, and Lamar Williamson; plaintiffs Alex H. Rowell and William R. Humphrey as Receivers for the Cypress Creek Drainage District appearing by their attorneys Mr. DeWitt Poe of McGehee, Arkansas, Mr. Hendrix Rowell of Pine Bluff, Arkansas, and Lamar Williamson of Monticello, Arkansas; the plaintiff Cypress Creek Drainage District appearing by its attorneys Mr. DeWitt Poe and Mr. Lamar Williamson; the plaintiffs Mercantile-Commerce Bank & Trust Company and Mercantile-Commerce National Bank in St. Louis appearing by their attorney Mr. Fred Armstrong of the firm of Thompson, Mitchell, Thompson & Young of St. Louis, Missouri; and the plaintiff St. Louis Union Trust Company, individually and in its own right and as Trustee for bondholders in a pledge instrument and mortgage executed by the Cypress Creek Drainage District, appearing by its attorney Mr. Henry Davis of the firm of Bryan, Williams, Kaye & McPheeters of St. Louis, Missouri; and the defendant, the United States of America, appearing by its attorneys the Hon. Fred A. Isgrig, United States District Attorney for the

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Eastern District of Arkansas, of Little Rock, Arkansas, and John C. Dyott, Esq. of St. Louis, Missouri, Special Assistant to the Attorney General.

All parties announcing ready for trial, the following proceedings were had:

Plaintiffs announced their reliance upon the following public documents which were offered in evidence by reference only, meaning thereby that the entire documents were not actually filed but were offered by reference as public documents from which any party to the action might read in evidence or argument any excerpts or quotations desired.

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## Exhibit 1.

Flood Control Act of May 15, 1928; 45 Stat. 534 et seq.; Public No. 391, 70th Congress; S. 3740; Title 33 U. S. C. A. Secs. 702a to 702n, inclusive; from which plaintiff read into the record from sections of said Act upon which she specifically relies, the following:

From Sec. 1. "That the project for the flood control of the Mississippi River in its alluvial valley and for its improvement from the Head of Passes to Cape Girardeau, Missouri, in accordance with the engineering plan set forth and recommended in the report submitted by the Chief of Engineers to the Secretary of War dated December 1, 1927, printed in House Document Numbered 90, Seventieth Congress, first session, is hereby adopted and authorized to be prosecuted under the direction of the Secretary of War and the supervision of the Chief of Engineers: Provided, That a board to consist of the Chief of Engineers, the president of the Mississippi River Commission, and a civil engineer chosen from civil life to be appointed by the President, by and with the advice and consent of the Senate, . . . is hereby created; and such board is authorized and directed to consider the engineering differences between the adopted project and the plans recommended by the Mississippi River Commission in its special report dated November 28, 1937, and after such study and such further surveys as may be necessary, to recommend to the President such action as it may deem necessary to be taken in respect to such engineering differences and the decision of the President upon all recommendations or questions submitted to him by such board shall be followed in carrying out the project herein adopted. The board shall not have any power or authority in respect to such project except as hereinabove provided."



From Sec. 2. "No local contribution to the project herein adopted is required."

From Sec. 4. "The United States shall provide flowage rights for additional destructive flood waters that will pass by reason of diversions from the main channel of the Mississippi River."

From Sec. 9. "The provisions of sections 13, 14, 16, and 17 of the River and Harbor Act of March 3, 1899, are hereby made applicable to all lands, waters, easements, and other property and rights acquired or constructed under the provisions of this Act."

Exhibit 2. Document No. 90, House of Representatives, 70th Congress, 1st Session, December 1, 1927, introduced over objections and exceptions of defendant from which the plaintiff read into the record as evidence from sections of said document upon which she especially relies, the following:

From Sec. 2, p. 3, of said Doc. 90. "The plan is a comprehensive one, . . ."

From Sec. 3. "The recommended plan fundamentally differs from the present project in that it limits the amount of flood water carried in the main river to its safe capacity and sends the surplus water through lateral floodways. Its essential features and their functions are:

"Floodways from . . . the Arkansas River through the Tensas Basin to the Red River . . . These will relieve the main channel of the water it can not carry and lower the floods to stages at which the levees can carry them. . . ."

"Local setting back of the levees in the main river at bottle necks to increase its carrying capacity and reduce its flood heights."

"Greater protection against crevasses by strengthening the levee by reducing flood heights through the increased widths of channel afforded by floodways, spillways, and set-backs and by moderately raising the levees where needed to meet predicted flood stages."

From Sec. 7. "Man must not try to restrict the Mississippi River too much in extreme floods. The river will break any plan which does this. It must have the room it needs, and to accord with its nature must have the extra room laterally. . . . The water which can not be carried in the main channel with the levee at reasonable height must be diverted and car-

ried laterally. \* \* \* As a general setback is not practicable the remainder must be supplied by floodways paralleling the general course of the river."

From Sec. 8. "The plan recommended provides the requisite space for the passage of floods, and levees of adequate strength to withstand them, so that should a flood recur of the magnitude of the flood just experienced, the maximum of record, it would be passed out to the Gulf without danger to life in the alluvial valley, and without damage to property except in the floodways allotted for its passage."

From Sec. 16. "From the mouth of the Arkansas to the Old River, at the mouth of the Red, extreme floods can not be carried between levees of the Mississippi without dangerous increase in their heights. A flood way for excess floods is provided down the Boeuf River, on the west side of the river. \* \* \* The entrance to the flood way is closed by a safety plug section of the levee, at present grade, which is located at Cypress Creek, near the mouth of the Arkansas. To insure their safety until this section opens, the levees of the Mississippi, from the Arkansas to the Red, will be raised about 3 feet. To prevent flood waters from entering the Tensas Basin, except through the flood way during high floods, the levees on the south side of the Arkansas will be strengthened and raised about 3 feet as far upstream as necessary."

From Sec. 17. "The section at the head of the flood way will protect the land within the flood-way levees against any flood up to one of the magnitude of the 1922 flood. A flood of a magnitude somewhere between that of 1922 and of 1927 will break it, turning the excess water down the flood way, which will carry it safely to the backwater area at the mouth of the Red river."

From Sec. 23. "The area in the alluvial valley that would be flooded by the Mississippi River water if there were not protecting works is approximately 30,000 square miles. 149 Under the plan recommended, barring accident, approximately 20,550 square miles will be protected annually. The remaining 9,450 square miles, of which approximately 3,340 square miles is cleared land, will be protected on an average of from 2 years in 3 to 14 years in 15, depending upon its location. The remaining 6,110 square miles are swamp and timber land which is not injured by flood."

From Sec. 29. "The cost of the project is unquestionably justified. It will prevent a repetition of the widespread dis-

aster, human suffering, dislocation of the economic life of the valley, interruption of interstate commerce, and the effect on the general welfare of the Nation, that attended the recent flood. The expenditure would be justified even though such a flood occurs but once in 150 years."

From Sec. 38. "The comprehensive plan now presented"

("Mr. Williamson: The repetition of this statement 'the comprehensive plan' is to show that the project is one plan, and one project, and it covers the entire valley.")

From Sec. 39. "In view of the national aspect of the flood-control problem from the standpoint both of the cause and of the effects of the floods, and in view of the large sums spent in the past by the people of the valley for flood protection, the sacrifices they have made in meeting their allotments, the great losses suffered in the past flood, and the larger expenditures now required, it is believed that the United States should bear a larger proportion of the cost of construction than in the past, and that of the States or local interests be as small as consistent with the results desired."

From Sec. 43. "The Mississippi River is the world's greatest river, combines size with usefulness, and is one of the grandest and most valuable assets of the United States."

From Sec. 45. "Through its aid to drainage, navigation, water supply, power, manufacturing, agriculture, and other incidental uses, it renders vital service to over 40 per cent of the area of the country. Its waters come from 31 States, and, were it not for the levees, would in flood cover 30,000 square miles, a territory greater than many of our States."

From Sec. 46. "Its alluvial valley has a growing population and contains the largest area of the richest land in the United States."

From Sec. 47. "Its worst characteristic is that its floods inflict at times great damage upon the people and property in the alluvial valley of the lower river. They take their toll in life and in damage to property, affecting the inhabitants of the valley and investors, manufacturers, and consumers throughout the country. They interfere with the food supply and the general welfare of the country, with its postal service and transcontinental and other interstate commerce."

From Sec. 56. "The integrity of the levee line is dependent upon the levees being high enough to preclude overtopping by any possible flood. Water higher than provided for

will overflow a sandy earth levee and produce a crevasse with dire consequences. A sudden break or crevasse in the levee line emits a torrent at high velocity. A deep hole is quickly scoured out and a mass of sand is deposited on the adjacent land. The deep gap lets water out of the river until the  
 150 river stage falls below the natural bank. This inundates an area many miles from the river for a long period of time, and replanting of crops has to wait for the water to recede. It is not possible to close the crevasse until the next low-water season, and later secondary rises of the river, which without the crevasse would do no harm, overflow the land back of the levee again and perhaps ruin a second planting."

From Sec. 76. "Levees only.—The confinement of flood flows by levees has substantially raised the flood heights."

From Sec. 77. "Several thousand cross sections of the river measured from time to time do not show any material change in the channel itself. Although the confinement of the river between levees has caused large increases in flood heights, it has not caused as yet any cumulative changes in the elevation of the river bed itself."

From Sec. 80. "Since 'levees only' can not be relied on to produce by scour a channel sufficiently large to care for all floods, such channel can be obtained only by setting back the levees or by raising them. Setting back is shown elsewhere to be impractical. To raise the levees on the Mississippi sufficiently to hold the maximum predicted flood with a 5-foot freeboard would require that they be raised 12 feet at Cairo, 19 feet at Arkansas City, 12 feet at Angola, and 6 feet at New Orleans. An increased section and 5-foot freeboard would be necessary for such high levees. Such a raising is most inadvisable since the levees are now about as high as they should be. Levees of such heights would increase tremendously the hazard from possible crevasses and would involve many foundation difficulties. It is doubtful if such a raising would be practicable. The cost would be \$566,500,000."

From Sec. 88. "Since it is possible to have a stage 14 feet above the present levee top at Arkansas City, the St. Francis reservoirs would not completely solve the problem."

From Sec. 96. "The confinement of the Mississippi River within levees and the great development of drainage systems in recent years have raised flood stages materially and this raising has exceeded estimates made in the past. Were it attempted to hold the water within the present levee lines by raising them, river stages are possible as much as 6 feet



above the present levee grade at Cairo, 14 above the present levee grade at Arkansas City, and from 10 to 13 feet above levee grade below Red River. The levees now have an average height of about 18 feet. The practical means to meet this situation is to spill the water out of the main leveed channel at selected points when the stages reach the danger point."

From Sec. 97. "The water within the river channel does no damage whatever and it should be kept within the channel as long as possible. The excess must be spilled through safety valves when the volume exceeds the safe capacity of the river. These safety valves consist of one controlled spillway, several relief or fuse-plug levees at present levee grade and one levee of reduced height, all emptying into natural floodways wholly or partially leveed."

151 From Sec. 98. "The levees generally will be raised about 3 feet, so that the selected, weaker relief levees will be at about the elevation of the present levee top and will surely serve their purpose."

From Sec. 99. "The plan is economical, adequate, and comprehensive, and provides for the disposal of all water predicted as possible."

From Sec. 109. "The control of the relief levees at the head of the Atchafalaya Basin must be under the authority of the United States. The plan is to maintain them at their present elevations and strength."

From Sec. 117. "Old River to the Arkansas.—The flood of 1927 rose to 60.5 on the Arkansas City gauge. It has been estimated that had it been confined and crevasses not occurred the gauge height would have been 69. The top of the present levee is 60.5. To take care of this flood with proper freeboard would require present levees to be raised about 12 feet. Such an increase in levee height would greatly intensify the disaster resulting from an accidental failure of a levee, besides being inordinately costly. Nor would they be safe, for it has been estimated that floods might come which would produce, if confined, stages of over 74 feet. It is obvious that no attempt should be made to raise levees to such a height. The practical remedy is to raise the levee grade 3 feet on both sides of the Mississippi below the Arkansas River, to strengthen these levees so that they will not fail from causes other than accident or overtopping, and to preclude overtopping by insuring that the water in excess of the capacity of the leveed channel be spilled out near the mouth of the Arkansas."



From Sec. 118. "To insure that excess water will leave the main river, a fuse plug section of the levee in the vicinity of Cypress Creek must be kept at its present strength and at its present grade, viz. 3 feet below the new levee grade. This relatively weak section will be long enough to discharge the greatest predicted possible excess water over and above the capacity of the leveed river below. In order to limit the land in the Tensas Basin overflowed by it, levees will be constructed on each side of the Boeuf River bottom, where natural ridges do not serve, from the Cypress Creek levee to backwater in the lower Tensas Basin. Arkansas City is to be enclosed with a levee. This floodway will be wide enough to carry the water without clearing and without maintenance except for the side levees. It is unwise to attempt to limit the volume of flow that may possibly enter the floodway to a narrower floodway that might prove of insufficient capacity. A narrower floodway cleared of timber was considered, but the clearing was found to be unwarrantably expensive in first cost and maintenance for the increased efficiency of discharge produced thereby. It will be much better to let the land be gradually cleared as it is developed for use. At some future time, the development of the region may warrant the first cost and maintenance of a cleared floodway of less width."

From Sec. 119. The Boeuf River bottom is selected for this diversion because it is the most suitably located to receive the water, is the most direct route, has the best width, and covers largely undeveloped swamp land. Water will not top the Cypress Creek fuse plug levee and go down the floodway until it is so high that it must find an outlet. No flood except that of 1927 has reached such a stage. However, due  
152 to an increase in flood heights by reason of levee construction and drainage, it has been estimated that a stage over the present levee top at Cypress Creek might occur in the long run about once in 12 years."

From Sec. 120. "The United States must have control over the Cypress Creek levee and keep it substantially at its present strength and present height."

From Sec. 121. "The remainder of the alluvial valley on each side of this stretch of the river, barring accident, will have complete protection from all possible floods."

From Sec. 127. "The St. Francis Basin generally, the city of Helena, and the upper Yazoo Basin on the east, will be protected against the greatest predicted flood and have an ample levee freeboard for a flood equal to that of 1927. These levees will be strengthened as well as raised. The draw

down from the Cypress Creek relief levee into the Boeuf River diversion below makes it possible to protect the lower part of this section of the river from superfloods without excessive levee raising. The floodway between Cairo and New Madrid accomplishes the result desired above. The average amount that levees are to be raised throughout is approximately  $3\frac{1}{2}$  feet above the present adopted grade."

From Sec. 129. "The comprehensive project recommended is intended to control flood waters of the Mississippi River throughout its alluvial valley. In order to do this effectively, levees should be constructed where necessary to prevent the flood water of any one of the great basins of the alluvial valley from flowing into the basin below it, except through the relief or fuse plug levees intended to carry off the excess waters during high floods. The plan proposes the strengthening of the levees on the south side of the Arkansas and Red Rivers and raising them about 3 feet, as far upstream as is necessary for that purpose."

From Sec. 131. "Channel stabilization.—Since the levees within the limits of this project are to be greatly enlarged, they will be much more expensive than heretofore, so something must be done to avoid the frequent moving of them from the proximity of caving banks. \* \* \* A general bank-protection scheme must be carried out. This will consist of revetting banks by proven methods and in addition trying new and cheaper methods to accomplish the same result."

From Sec. 138. "The project is to be completed within 10 years."

From Sec. 139. "The plan herein recommended is general in its scope. It is recommended that the responsibility for the execution of the plan, the details of the design, and location of the engineering works and structures be placed upon the Chief of Engineers under the supervision of the Secretary of War, as is done by acts of Congress in the case of river and harbor improvements."

From Sec. 140.\* "Since the protection and preservation of the flood-discharge capacity of the alluvial valley of the Mississippi River is requisite to the common welfare of the Nation and to the preservation of the many lines of interstate commerce which cross the valley, it should be protected and preserved by similar legislation. The warning can not be too strongly emphasized that unless the flood-discharge capacity provided in the plan herein recommended is preserved, a future great flood will result in a disaster as great as or greater than that experienced this year."

From Sec. 141. "To expedite the acquisition of rights of way for structures, the procedure already authorized by the laws relating to works of improvement of rivers and harbors should be made applicable to flood-control works."

From Sec. 147. "I recommend the adoption and authorization of a comprehensive project for the flood control of the Mississippi River in its alluvial valley and its improvement from the Head of the Passes to the Ohio River as set forth in this document, to be prosecuted under the direction of the Secretary of War and the supervision of the Chief of Engineers; the project to include the floodways, spillways, levees, channel stabilization, mapping, etc."

From Sec. 149. "I further recommend that legislation be enacted:—

"(a) Prohibiting any obstruction not affirmatively authorized by Congress to the flood discharge capacity of the alluvial valley of the Mississippi River below Cape Girardeau and providing that it shall not be lawful to build or commence the building of any levee or other structure in said alluvial valley, or in any flood way provided therein unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War. . . .

"(e) Providing that existing laws relating to the acquisition of lands, easements or rights of way needed for a work of river and harbor improvements shall be applicable to the acquisition of lands, easements, or rights of way for flood-control works."

"Mr. Dyott: Now, if the Court please, we move that these sections be stricken as evidentiary matter, for the reason that they are not the best evidence, as seeking to indirectly inject the testimony of the author of that document, without giving the Government any opportunity to cross-examine, that the sections enumerated are the expressions of opinion, any of which cannot possibly bind the Government and which have not been enacted into law; that it is secondary evidence at the best, if any evidence at all and that the sections, if any evidentiary matter, are irrelevant and immaterial and I ask that they be stricken.

"The Court: Overrule the motion.

"Mr. Dyott: Save our exceptions. And just one other objection that the plan as there explained has been abandoned by the Act of Congress in what has been specifically known as the Overton Act.

"The Court: Overrule the motion."

"Mr. Dyott: Save our exceptions."

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Exhibit 3 is the official map of the middle section of the alluvial valley of the Mississippi River showing "plan of the Army Engineers for Flood Control adopted by the Act of May 15, 1928," a public document, the original of which 154 will be transmitted and filed with this transcript.

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Exhibit 4 is a map showing the drainage area of the Mississippi River and its tributaries.

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Exhibit 5 is a quadrangle map showing the location of plaintiff's 40 acres of land with reference to Arkansas City, the Mississippi River, Cypress Creek, and the fuse plug levee.

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Exhibit 6 is Committee Document No. 28, House of Representatives, 70th Congress, 2d session, dated August 8, 1928, a public document, being the Report to the President of the Mississippi River Flood Control Board created by section 1 of the Flood Control Act of May 15, 1928, from which the plaintiff read into the record (over the objections and exceptions of the defendant) the following: o

"Conclusions of the Board. 43. In view of the above, the Board is of the opinion that— \* \* \* (d) The fuse-plug relief levee at existing levee heights provides the best solution of the spillway problem. \* \* \* (h) The adopted project provides a sound engineering plan which, while meeting all the above requirements, is also economical.

"44. The board therefore recommends the adopted project submitted by the Chief of Engineers to the Secretary of War, dated December 1, 1927, and printed in House Document No. 90, Seventieth Congress, first session."

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Exhibit 7 is Committee Document No. 2, House of Representatives, 71st Congress, 1st Session, entitled "Opinion of the Attorney General in Regard to Certain Provisions of the Mississippi Flood Control Act of May 15, 1928," a public document, from which plaintiff read into the record the following:



"First. We ask Executive consideration and interpretation of section 4 of the Flood Control Act of May 15, 1928.

"We represent that it was the intent of Congress in this section to assure compensation for flowage rights over land embraced within all spillways and floodways and for damage where injury is done to property; also for easements putting additional servitudes on land in the building of spillways, floodways, or other diversion works for flood prevention under the act." (Brief presented to President Hoover by Senators and Representatives from States in the Mississippi Valley, dated May 14, 1928).

The Secretary of War requested an opinion of the Attorney General to which he attached copies of the following letters from the President :

"August 13, 1928.

"The policy and method of dealing with the problem set out in the report, dated August 8, 1928, of the board provided for in section 1 of 'An act for the control of floods on the Mississippi River and its tributaries, and for other purposes,' approved May 15, 1928, hereto annexed, are approved. The balance of the report is approved excepting and reserving for my future action those parts which contemplate the acquiring of rights in land for constructing spillways and floodways.

(Signed) "Calvin Coolidge,  
President."

(Ex. 7, p. 10;)

"The White House,

"Washington, January 10, 1929.

"Supplementing my approval of August 13, 1928, of the report of the board provided for in section 1 of 'An act for the control of floods on the Mississippi River and its tributaries, and for other purposes,' approved May 15, 1928, which approved excepted and reserved for future action those parts of the report which contemplated the acquiring of rights in land for constructing spillways and floodways, the construction of the protection levees in the Boeuf Basin, as provided for in the adopted project, is approved.

"Land for rights of way for these levees will be secured by condemnation as authorized by law, provided that these lands may be purchased, when they can be thus secured at reasonable prices, which shall not in any case exceed two and one-half times the assessed valuation at the present time.

(Signed) "CALVIN COOLIDGE."

(Ex. 7, p. 12;)

And from the conclusion of the Attorney General's opinion, the plaintiff read into the record:

"For the above reasons, I am of the opinion that the project set forth in House Document No. 90, Seventieth Congress, first session, is the legal project to be executed in accordance with the law and that this project is fixed and not subject to review or change by this administration.

"WILLIAM D. MITCHELL,  
Attorney General."

(Ex. 7, p. 16;)

156 Ex. 7-A. SID B. REDDING, testified: I am the Clerk of this United States District Court and have been custodian of all of its records since April 1, 1901.

On July 1, 1929, the United States of America filed a petition for the condemnation of 481.75 acres of land in Chicot County, Arkansas, to be used for guide levee rights-of-way to be used under the provisions of the Flood Control Act of May 15, 1928; upon which the record shows the following court

"Order for Filing Petition

"Now, comes Chas. F. Cole, United States Attorney for the Eastern District of Arkansas and under instructions from the Attorney General of the United States, presents to the Court a petition requesting condemnation of 481.75 acres of land in Chicot County, Arkansas, under the provisions of "An Act for the control of floods of the Mississippi River and its tributaries, and for other purposes," approved May 15, 1928, and the Act of August 1, 1888, (25 Stat. 357).

"It is therefore ordered that the said petition be filed, and the Clerk of this Court issue to the Marshal of the Eastern District of Arkansas notices to be served upon the defendants according to law, returnable twenty days after service, at which time the case will be heard.

"This the 1st day of July, 1929.

"JOHN E. MARTINEAU,  
"United States District Judge."

(Ex. 7-A;)

On July 1, 1929, in said cause, the Court also issued the following

"Order

"On this day is presented to the Court a verified petition showing that there has been filed in this Court by Chas. P.

Cole, United States Attorney for the Eastern District of Arkansas, and A. L. Barber, Special Assistant to the said attorney, a complaint praying for the condemnation of the following described lands located in Chicot County, Arkansas, to be used for levee rights-of-way under the provisions of the Act of May 15, 1928, said lands being described as follows, to-wit: " (Here is described one stretch of the guide levees of the Boeuf Floodway).

"And it further appears that considerable time will elapse before a final hearing on said condemnation petition can be had, and it further appearing that the petitioner desires immediately to begin construction of the levee over and upon the lands sought to be condemned, and it further appearing that an appropriation has been made by Congress to pay for said rights-of-way, and that adequate funds are now available for that purpose. And the said petition being considered by the Court and the Court being well and fully advised doth order that the said petitioner, its agents and employees be, and they are hereby authorized and empowered  
157 to enter immediately upon and take full possession of said lands and enter upon the work.

"And it is further ordered that all persons be, and they are hereby enjoined and restrained from interfering with or in any wise obstructing the petitioner, its agents and employees from taking full possession of said lands, and that the Court reserves the right to make further and additional orders as may be necessary in the premises.

"JOHN E. MARTINEAU,  
"United States District Judge."

(Ex. 7-B;)

#### Exhibit 8.

On December 18, 1934, said condemnation suit was dismissed by the following Court order:

"Comes the United States by Fred A. Isgrig, United States Attorney and upon its motion it is ordered that this cause be and the same is hereby dismissed." (Ex. 8;)

#### Exhibit 9.

"Report of Third District Officer Capt. Clarke S. Smith, Corps of Engineers, U. S. A., Mississippi River Commission, on Results of Investigation of Arkansas River Levees and of the Practicability of Diverting Cypress Creek Drainage into Interior Streams," was rejected by the Court. Exceptions saved.

## Exhibit 10.

"United States Department of Agriculture Bulletin No. 198," dated April 21, 1915, entitled "Report upon the Cypress Creek Drainage District, Desha and Chicot Counties, Arkansas," to which is attached "Figure 3," being a "Map of the Cypress Creek Drainage District, Desha and Chicot Counties, Arkansas," prepared by the United States Department of Agriculture as a part of Bulletin No. 198.

The report recites:

"Apparently the only serious defect in the levee system is the gap at the mouth of Cypress Creek. . . . The plan of the Mississippi River Commission made in 1907, provides merely for the diversion of Cypress Creek in order that the gap in the levee might be closed, and makes no provision for the further drainage of Desha County." . . . "Before Desha County can be developed to any considerable extent, efficient drainage must be obtained. The diversion of Cypress Creek and the closure of the gap in the levee will be the first vital step toward that end, but that will not be sufficient."

The report then recommends the drainage system shown by Figure 3.

Over the objection and exceptions of plaintiff, the Court refused to admit any part of the above exhibit in evidence.

## Exhibit 11.

Mr. Williamson: "In order to systematically present our theory of the case to the Court, we would now like to call the Court's attention to Act 80 of the General Assembly of the State of Arkansas, approved February 25, 1915, which creates the Cypress Creek Drainage District, and offer for the record a short excerpt upon which we rely, as follows:"

From Sec. 3, Act 80, approved February 25, 1915, Arkansas General Assembly:

"The intent and purpose of this Act being to protect the territory described in section 1 hereof from floods from the gap in the Mississippi River levee between Jefferson Lake and Cypress Creek, and to provide a complete and thorough system of drainage for surface water, said board is hereby authorized, empowered and directed to adopt the maps, profiles and other information shown by the survey now on file in the office of the present Board of Directors of said district,



which maps and profiles were made under the supervision of the Bureau of Drainage Investigation of the United States Department of Agriculture; and is authorized, empowered and directed to construct canals Nos. 18, 19, 43 and 81, as shown upon said map marked 'Figure 3,' and is empowered and directed to remove any and all dams and levees which may be located across the projected line of said canals. Said board is hereby directed to extend canal 18 up to the north-west corner of section 19 in township 11 south, range 3 west.

"It being known that in order to construct said canals it will be necessary to remove the levee now standing across the head of Boggy Bayou, in Desha County, it is hereby made the duty of said Board of Directors to construct a levee from what is known as the terminus of the Jefferson Lake levee to a point where the same will intersect and join the levee in the Desha Levee District on the south bank of Cypress Creek; said levee shall be located along the line selected by the United States engineers in charge of the third improvement district of the Mississippi River, and shall be constructed in accordance with the plans and specifications adopted by the Mississippi River Commission for the construction of levees on the Mississippi River. \* \* \*

"If the owners of land in any part of Desha County desire to avail themselves of the lateral canals as shown by said Figure 3, they may do so by organizing sub-districts as provided by the general drainage law of this State, and shall have the right to connect the laterals constructed by them with the main drainage canals, provided said laterals  
159 are constructed according to the plans and specifications of said United States Department of Agriculture."

#### Exhibit 12.

Title 33, U. S. C. A., Sec. 702, excerpts on which plaintiff relies read into the record as follows:

"Mississippi River. Authorization of flood-control work. For controlling the floods of the Mississippi River and continuing its improvement from the Head of the Passes to the mouth of the Ohio River the Secretary of War is hereby empowered, authorized and directed to carry on continuously, by hired labor or otherwise, the plans of the Mississippi River Commission, prior to March 3, 1923, or thereafter adopted, to be paid for as appropriations may from time to time be made by law; and a sum not to exceed \$10,000,000 annually is hereby authorized to be appropriated for that purpose, for a period of six years beginning July 1, 1924.

"How appropriations expended. (a) All money appropriated under authority of this section shall be expended under the direction of the Secretary of War in accordance with the plans, specifications, and recommendations of the Mississippi River Commission as approved by the Chief of Engineers, for controlling the floods and for the general improvement of the Mississippi River, \* \* \*."

"Contributions by local interests to levee work. (b) No money appropriated under authority of this section shall be expended in the construction or repair of any levee unless and until assurances have been given satisfactory to the commission that local interests protected thereby will contribute for such construction and repair a sum which the commission shall determine to be just and equitable but which shall not be less than one-half of such sum as may have been allotted by the commission for such work: Provided, That such contributions shall be expended under the direction of the commission, or in such manner as it may require or approve, \* \* \*."

"(d) No money appropriated under authority of this section shall be expended in payment for any right of way for any levee which may be constructed in co-operation with any State or levee district under authority of this section, but all such rights of way shall be provided free of cost to the United States." \* \* \*

"Upon the completion of any levee constructed for flood control under authority of this section, said levee shall be turned over to the levee district protected thereby for maintenance thereafter; but for all other purposes the United States shall retain such control over the same as it may have the right to exercise upon such completion. (Mar. 1, 1917, c. 144, sec. 1, 39 Stat. 948; Mar. 4, 1923, c. 277, 42 Stat. 1505.)"

"Mr. Williamson: Now, we call attention at this point of the record to Section 408 in Title 33 U. S. Code Annotated, which is one of the sections which the Flood Control Act of May 15, 1928, expressly adopts and makes applicable to the different floodways, and that section reads:

"It shall not be lawful for any person or persons to take possession of or make use of for any purpose, or build upon, alter, deface, destroy, move, injure, obstruct by fastening vessels thereto or otherwise, or in any manner whatever impair the usefulness of any sea wall, bulkhead, jetty, dike, levee, wharf, pier, or other work built by the United States, or any piece of plant, floating or otherwise used in the construction of such work under the control

of the United States, in whole or in part, for the preservation and improvement of any of its navigable waters or to prevent floods, \* \* \* (Mar. 3, 1899, c. 425, sec. 14, 30 Stat. 1152).’ ”

From Title 33, U. S. C. A., Section 648:

“The jurisdiction of the Mississippi River Commission is extended so as to include that part of the Arkansas River between its mouth and the intersection thereof with the division line between Lincoln and Jefferson Counties, \* \* \* (July 27, 1916, c. 260, sec. 1, 39 Stat. 402.)”

### Exhibit 12-A.

From Report No. 1100, House of Representatives, 70th Congress, 1st session, the official Report from the Committee on Flood Control to the House of Representatives, to accompany S. 3740 (which became the Flood Control Act of May 15, 1928), the plaintiff read into the record the following excerpts:

“Section 4 (referring to the Bill which became the Flood Control Act of May 15, 1928), provides compensation for property used, taken, damaged, or destroyed in executing the project, and for damages to public-service corporations through the necessity of adjusting or relocating properties to conform to the project, with the proviso that benefits resulting from the project may be weighed against damages caused by it. It also provides for the acquisition of lands, easements, and rights of way through condemnation proceedings, and for turning over the States and local interests the title to lands acquired under this section.” (Report No. 1100, supra, p. 4;)

“Of course the physical land itself is not intended to be turned over to the local interests, but only the title thereto, \* \* \*.” (Report No. 1100, p. 5;)

“Payment. Declares principle of local contribution sound, but in view of large expenditures heretofore made by local interests in alluvial valley, no local contribution to project is required.

“United States shall pay just compensation for all rights of way and damages, including expenses, to railroads or others in changing their property.

“Special benefits from flood-control plan shall be considered by way of reducing compensation to be paid.

**"Method of Acquiring Property.** Secretary of War may acquire lands, easements or rights of way by purchase, donation, or condemnation.

**"Condemnation proceedings to be instituted in United States district court.**

161 **"Court shall appoint three commissioners to appraise land, whose award, when confirmed by court, shall be final."** (Report 1100, p. 12;)

Incorporated in this Committee Report in the House of Representatives as a part of the debate is an explanation of the Bill by Senator Jones, the author of the Act, in the Senate, immediately before the Bill was passed unanimously by the United States Senate, as follows:

**"Mr. King:** Do the limits of cost suggested by the Senator include the cost of the overflow of from a million to two million acres of land and the purchase of rights of way or easements over the same?

**"Mr. Jones:** Yes; the Mississippi River Commission plan includes in the estimate of \$407,000,000 damages for rights of way, flowage, and so on. The General Jadwin plan submitted to Congress, which estimated the cost to be, I think, about \$290,000,000, differed very materially from the Mississippi River Commission plan in that particular. That accounted for the much lower estimate they originally submitted.

**"We have provision in the bill for condemnation of rights of way, flowage rights, and so on. We feel that under the constitutional provision no private property can be taken for public use without compensation. We could not avoid that if we desired to do so. We have put a provision in, which I will explain, as the Senator has asked the question, expressly requiring that benefits shall be offset against damages found. We feel that is as far as Congress could possibly go. If we sought to pass legislation authorizing the taking of private property without compensation, the courts would not uphold such a provision. . . ."**

**"Mr. King:** Is this a proposition for the reclamation of lands, or merely for the purpose of controlling the waters of the Mississippi River so that they shall not inundate contiguous territory?

**"Mr. Jones:** I think I can state that it is for the latter purpose the Senator has mentioned. It is to control the floods of the Mississippi River from Cairo down." . . .



"Mr. King: I would like to ask one other question. Leaving out the tributaries and considering only the work which General Jadwin and other engineers who have given this subject attention think are necessary, what will be the [the] cost?

"Mr. Jones: As I said a moment ago, fundamentally there is but little difference. The Mississippi River Commission estimated the cost of its smaller project at \$407,000,000. General Jadwin estimated the cost of what he originally proposed at something like \$290,000,000. There was a difference between the two plans in one particular of about \$100,000,000. General Jadwin, on what is known as the Boeuf spillway, one of the important parts of this project, estimated only a little over \$7,000,000 to take care of the damages to rights of way and matters like that. In other words, his contention is that there is a natural flowage right there, and that the people have no legal right to claim any damages if the Government floods it. The Mississippi River Commission estimated the damages there as something over \$100,000,000. That accounts really for a hundred million dollars difference between the two plans.

"Mr. King: I confess that I was startled when I was told by a Senator that it might be necessary to submerge at times, and to acquire, therefore, an easement over 2,000,000 acres of land. Those lands heretofore in some sections have not been of very great value, and in other places they have been of great value. There is no doubt that if the Government seeks to condemn them they will have great value. The necessity of the purchase by the Government of 2,000,000 acres of ground, or the purchase of the right to overflow it, will entail an enormous cost; and I was wondering just what proportion of these large estimates being submitted by the Senator was to cover the cost of acquiring lands in fee or easements over the same.

"Mr. Jones: We have to get these rights of way and, as I said, there is a difference of a hundred million between the two plans in the very particular the Senator is talking about. . . . The proposition the Senator has in mind is involved in what is known as the Boeuf floodway, which would be a spillway to divert water from the Mississippi River and flow it, I think, 150 or 160 miles." . . . (Report 1100, p. 26-27;)

163 "Mr. Jones. . . . Mr. President, section 4 provides for just compensation, and is framed on the theory of the constitutional provision that where property is taken for public use it must be paid for. As I said a while ago, we have

provided here that the benefits shall be used as offsets to the damages.

"Mr. Edge: Who assesses those benefits—the commission or a court?

"Mr. Jones: The bill provides for condemnation, of course, by the court, and authorizes the court to appoint a commission of three to determine the damages and assess the benefits. There are some other minor provisions in section 4."

### Exhibit 12-B.

From Document No. 798, House of Representatives, 71st Congress, 3d Session, Vol. 1, being a report dated February 28, 1931, from the Chief of Engineers, United States Army, on review of existing projects for flood control in the alluvial valley of the lower Mississippi River, the plaintiff read the following excerpts into the record:

"It is well to note at this point that past estimates of floods have been much in error by underestimation. The 1927 flood exceeded all previous estimates. Estimates for the future based alone on the limited experience of the past are likely to err but not on the side of safety." (Doc. 798, p. 2;)

"The adopted project assumes that in time of maximum flood over 900,000 cubic feet per second may escape into the Boeuf Basin. 1,500,000 cubic feet per second into the Atchafalaya Basin, \* \* ." (Doc. 798, p. 3;)

"The approved project contemplates more than 900,000 cubic feet per second escaping just below the mouth of the Arkansas, \* \* ."

"No serious objection has been raised to the Bonnet Carré floodway. The Federal Government is paying for the land there." (Doc. 798, p. 6;)

"The levees in the proposed flood ways interfere with the drainage. In the adopted project, it is proposed simply to leave gaps for drainage in the protecting levees at all crossings of drainage lines. Unless these gaps are closed by flood gates, the full benefit of the levees will not be realized; if they are closed by flood gates, natural drainage of the land will require pumpage or diversion when the gates are closed. This feature must be solved in some way more satisfactorily than it is left in the adopted project, and the local interests should have a voice in its solution. The Federal Government should provide levees and flood gates and such additional

ditches as may be necessary and economical for the use of flood gates." (Doc. 798, p. 7-8;)

"The Board of Engineers for Rivers and Harbors, the membership of which has not heretofore been responsible for the adopted project, in its report appended hereto recommends as follows:

"1. That no modification of the adopted project be made at the present time.

"2. That the construction of the side or protection levees in the Boeuf and Atchafalaya Basins be deferred until the question of damages to lands and property between these levees has been determined by the courts." (Doc. 798, p. 13;)

164 "The adopted project differs from previous plans in that it does not attempt to confine all of the flood waters within the main leveed channels. Levees high enough and strong enough for this purpose would be impracticable from an engineering standpoint, would be prohibitive in cost and would greatly increase the flood hazard. In its provision for levees of reasonable length and moderate height, and for allowing flood waters in excess of the safe carrying capacity of the leveed channel to escape through lateral flood ways and spillways, the adopted project is sound. \* \* \* The board is of the opinion that 1 foot freeboard is not sufficient for levees that are to confine extreme floods. There is too much uncertainty as to the exactness of the computation of flood heights, too much risk of failure of a levee with water lapping at it within a foot of its crest, too great a possibility that levees will not be maintained to full height at every point at all times, to pronounce a plan of this kind a safe protection to life and property. The board considers 3 feet above the calculated crest of the superflood as the least height to which the levees should be built if protection against such a flood is to be given." (Doc. 798, p. 25;)

"The escape of flood waters through the Boeuf and Atchafalaya Basins, is an essential feature of any economically feasible plan for the control of floods in the lower Mississippi Valley. The restriction of flow by means of side or protection levees in these basins is not essential to the escape of the flood waters but is advisable for the protection of certain lands, and for the protection of life and property, where the cost is not excessive." (Doc. 798, p. 26;)

"The function of the fuse-plug levees provided by the adopted project at the heads of the Boeuf and Atchafalaya

Basins, is to prevent the flow in the main river below from exceeding the safe carrying capacity of the leveed channel. It is expected that water flowing over the tops of the fuse plug levees will cause crevasses, with the result that the requisite amount of water will promptly escape from the main river. As a safety measure the fuse plug sections have been left with sufficient length to allow the escape over their tops of sufficient water if they should happen not to crevass, but act only as weirs. \* \* \*

"Reduction in height of the fuse-plug levees would result in earlier and more frequent flooding of the lands in the basins. Their complete elimination would mean that these lands would be overflowed approximately every year. Drainage problems would be increased," (Doc. 798, p. 27;)

"At Cypress Creek just below the mouth of the Arkansas, the existing levee is not to be raised and, in extraordinary floods, flood waters at stages exceeding 60.5 on the Arkansas City gage or the crest of the present levee will pass over it and follow their natural course through the Boeuf Basin. With an increase in stage sufficient water will pass through the Boeuf Basin to hold the gage heights at Arkansas City when the crest of the superflood is reached to 62.5. At this time approximately 1,950,000 cubic feet per second will pass down the main river and the remainder through the basin. The momentary peak flow into the Boeuf Basin at the vicinity of Cypress Creek may be 1,250,000 cubic feet per second, the average for about 10 days being about 900,000 cubic feet per second." (Doc. 798, p. 44;)

"The protection levees are not at all essential to the proper functioning of the plan in the adopted project but were included merely to furnish local protection or reclamation." (Doc. 798, p. 47;)

165 "It is worthy of note that all flood projects on the Mississippi which have been based on the last high water have proven insufficient. Predictions indicate that a flood larger than that of 1927 may occur at some future time." (Doc. 798, p. 47;)

"With regard to the adopted project attention has been invited to the protection levees in the Boeuf and Atchafalaya Basins which have been protested by local interests and to the fact that these levees are not essential to the proper functioning of the plan but are merely to afford the maximum amount of local reclamation in the basins which was thought economically justifiable.



"I therefore recommend:

"(a) That no change be made in the project;

"(b) That all works other than the protection levees in the Boeuf and Atchafalaya Basins be pushed to completion."

(Signed) T. H. JACKSON,  
Brigadier General, Corps of Engineers,  
Division Engineers.

October 15, 1930.

(Doc. 798, p. 54;)

### Exhibit 13.

From public document "Hearings before the Committee on Flood Control, House of Representatives, 73d Congress, Second Session," dated February 27, 1934, plaintiff read into the record the following statements of Maj. Gen. Edward M. Markham, Chief of Engineers, United States of America:

"I think I have devoted, since I have been handling this field, I have devoted myself to nothing more assiduously than trying to find what is the solution of the Boeuf Basin. There is not any question about it. It is in a flux condition that somehow should be settled. There are no simplicities in it. It demands patience in order that a great many things shall be schemed and worked out and it has a great deal to do with Federal money to a rather vast extent. For example, I cannot find with our appraisals all through the areas of the Boeuf and Atchafalaya why the Agricultural Department undertook to determine what in fact are the values that have been destroyed by way of these flood confinements, the railroads, roads, and other things that were in that basin—I cannot find that as an appraisal the amount of money involved is less than about \$205,000,000". (Exhibit 13, p. 23;)

"The same thing applies to cases against the United States for land claims in the Bonne Carre spillway. Therefore, I am unable after 6 weeks in studying two reports that are on my desk to conclude what I would dare tell Congress to be the cost of acquiring those spillways. I do not know." (Exhibit 13, p. 24;)

"I greatly sympathize with the Boeuf Basin, really and truly; but the physical facts that can be verified by any intelligent engineer are these: It is perfectly manifest that something like a million cubic feet of water will have to be handled in that valley. It can be loosely said that that river will take within its banks 1,000,000 cubic feet per second; and that over

a million feet has to go out of there whether anybody likes it or not, and it will pass or break the levees of doubtful location; in other words it will break where it will. \* \* \* We, therefore, know that if you pile water below the fuse plug into that lower river you can look for a great disaster, a perfectly plain great disaster. The levees themselves in many of the runs below the Boeuf Spillway will not stand conveniently at the additional heights." (Exhibit 13, p. 24;)

166 "The Boeuf Basin has been put in a very unfortunate situation since the levees below the Boeuf Basin were designed with the theory that we will not permit beyond about 1,800,000 second-feet to pass the fuse plug. We would just as soon take 5,000,000 if we could. We say you cannot. Therefore, as I understand it, it was the conception of the law or of Congress that what we are working to is that there should remain in the system a fuse plug at Boeuf and down below Atchafalaya, and then that water will be taken out of the main stem to the west, as it stands, and I tell you frankly that I will do anything within my power to meet this situation equitably as I can but I can consent to nothing that increases substantially the flow of water below the fuse plug beyond 1,850,000 second-feet, because it courts disaster. \* \* \* In other words, we do not dare fairly and squarely as engineers who are capable—we do not dare to permit this water to pass that fuse plug. Now, that, of course, does not settle your question that should be settled, the extent to which there should be compensation down that valley. I do not know. (Exhibit 13, p. 25;)

W. A. Kelly, Engineer Appraiser of The Federal Land Bank of St. Louis, a civil engineer, representing The Federal Land Bank of St. Louis (Exhibit 13, p. 32;), testified to the Congressional Committee:

"We (The Federal Land Bank of St. Louis) will not make land-bank loans in the Boeuf Basin floodway. \* \* \* Because the flood protection is inadequate and not only because the flood protection is inadequate but because the Boeuf basin floodway project is hanging over their heads and that affects loans seriously, affects their land values so that if we acquired land there we think we would find it very difficult to sell. People are afraid to go in there because they do not know what is going to happen." (Exhibit 13, p. 36;)

#### Exhibit 14.

From Committee Document No. 1, House of Representatives, Committee on Flood Control, 74th Congress, 1st Ses-

sion, "Letter from the Chief of Engineers Transmitting Pursuant to a Resolution of the House Committee on Flood Control dated January 28, 1932, a Supplemental Report on Flood Control in the Alluvial Valley of the Mississippi River which Recommends Certain Extensions and Modifications of the Projects for Flood Control of the Mississippi River and Its Tributaries Set Forth in House Document No. 90, 70th Congress, 1st Session, and Adopted by the Flood Control Act of May 15, 1928," dated February 12, 1935, (submitting to the Congress what later became known as the Markham Plan involved in the Flood Control Act of June 15, 1936—the Overton Bill), plaintiff read into the record the following:

"Under the terms of the Act (Flood Control Act of May 15, 1928), compensation is being paid the owners of lands in the Birds Point-New Madrid Floodway for the excess flood waters to which they are thus to be subjected. In this northern section the levees are nearly completed, and the acquisition of flowage in the Birds Point-New Madrid Floodway is progressing satisfactorily." (Com. Doc. No. 1, p. 3;)

"In the middle section the flood discharges from above may be augmented by a great outflow from the Arkansas and the White Rivers. Levees ranging in height up to 40 feet or more would be necessary to confine the waters of an extreme flood. The adopted plan rejects such works as dangerous, and provides for levees of a height sufficient to carry intermediate floods, allowing for the escape of waters in the greatest floods out of the main river through a designated floodway. The levee at the head of the floodway is, under the plan, to be kept at its prior height and condition to form a fuse plug for the relief of such extraordinary floods. All other levees are to be raised and strengthened so as to afford protection except to the lands in the floodway under such conditions. Water from the extreme floods was to be confined within the floodway by guide levies. Since the hills extend to the river on the east side about midway of this middle section, the floodway is necessarily located through the low lands on the west side." (Exhibit 14, p. 3.)

"To prevent the overflow from the Arkansas River of the developed lands in Arkansas and Louisiana west of the Boeuf Floodway, the levees extending up the Arkansas to the high lands at Pine Bluff on the south side of that river have been raised and strengthened under the provisions of the project." (Exhibit 14, p. 4.)

"All parts of the project works in the middle section except the Boeuf Floodway and the raising of the main river levees

adjacent to its head have, in general, been completed." (Exhibit 14, p. 4.)

"The 1928 project provided for raising levees and for escape of excess flood waters at different locations. In general the levees are now as high as safety and reasonable engineering design permit. The higher the levees the greater is the damage from an accidental crevass." (Exhibit 14, p. 17.)

"The Arkansas and White Rivers emptying into the Mississippi just above Arkansas City, Arkansas, have been known to have a combined simultaneous discharge of over 1,000,000 cubic feet per second. Under 1928 flow conditions the resultant flow, obtained by adding the probable contribution of the White and Arkansas Rivers to the assumed flood arriving from Cairo, if confined by the raising of levees on their existent locations, would produce a stage of about 74½ feet at Arkansas City. To confine the river at such a stage the levees would have had to be raised about 14 feet. Since they were already more than 25 feet high in places, this seemed impracticable and the alternative course was selected of providing for the escape of such waters as could not be carried in the main river between levees of reasonable height. It was decided that an increase of approximately 3 feet in existing levee heights below Arkansas City was about as much as was desirable. This limitation called for the escape during the maximum probable flood of about 1,000,000 cubic feet per second and the topography of the valley required that this escape be on the west side of the river. It was accordingly decided to raise main river levees about 3 feet; to provide for the escape of surplus flow by refraining from the enlargement, above its present grade, of a stretch of the west bank levee line at the head of the Boeuf Basin; . . . " (Exhibit 14, p. 18.)

"The portion of the river levees that was not to be raised has become known as the 'Cypress Creek fuse plug'. Its crest elevation is such that stages which exceed 60½ feet on the Arkansas City gage will overtop it. Data indicated that under 1928 flow conditions in excess of 60½ feet would occur not more often, on an average, than once in 12  
168 years. The amount of water escaping would depend on the size of the flood, reaching a possible maximum of about 1,000,000 cubic feet per second in the so-called 'superflood'. The land in the Boeuf Basin that would be overflowed by the waters topping the fuse plug has been called the Boeuf Floodway. This floodway, comprising about 1,330,000 acres, 25 per cent cleared land, and 75 per cent swamp.



and timber land, was to extend from the fuse plug to Sicily Island Gorge (on Ouachita River at Harrisonburg, 60 miles below Monroe, La.). Passing through the gorge the flood waters were to spread out over Red River backwater area—the territory subject to overflow by reason of the gap in the levee system at the mouth of Red River (Old River).” (Exhibit 14, p. 19.)

“With the exception of the stretches adjacent to each end of the Cypress Creek fuse plug and immediately above Old River, the river levees of the middle section have, in general, been completed to project dimensions.” (Exhibit 14, p. 19.)

“Because of the large discharge from the White and Arkansas Rivers the section of Mississippi River from Arkansas River to Red River probably is the most critical from the viewpoint of flood control. The high stages resulting from combination of floods from the Mississippi, Arkansas, and White Rivers, make it impracticable to completely confine major floods between levees in this section of the river. Any plan for controlling major floods in this section of the river must include two principal elements, namely, discharge by the main main river leveed channel with levees at substantially their present grades and escape of excess water by some route west of the river.” (Exhibit 14, p. 21.)

“The capacity of the main leveed channel of Mississippi River between the mouth of the Arkansas and the entrance to the Eudora Floodway is not sufficient at present to prevent a break in the levees between Arkansas River and Eudora, nor is it possible at present to predict accurately where such a break would occur in a great flood, although experiments indicate that it would probably be on the west side above Arkansas City.” (Exhibit 14, p. 23.)

#### Exhibit 15.

From Report No. 985, House of Representatives, 74th Congress, 1st Session, dated May 23, 1935, to accompany H. R. 7349, a public document, the plaintiff read into the record the following:

“The War Department has the utmost sympathy for an owner whose property is injured without compensation. It believes that such owners deserve equitable treatment and compensation for flowage easements over their lands.

“These are the same conclusions reached by the Committee on Flood Control, after extensive hearings. The sole and

only issue is as to where rests the obligation for compensation. For the reasons heretofore given, as a matter of law and equity, the obligation rests upon the United States." (Exhibit 15, pp. 3-4).

### Exhibit 16.

From "Hearings Before a Subcommittee of the Committee on Commerce, United States Senate, 74th Congress, Second Session," dated January 27, 1936, relative to S. 3531 (The Overton Bill), which later became the Flood Control Act of June 15, 1936, a public document, plaintiff read into the record the following excerpts:

169 Maj. Gen. Edward M. Markham, Chief of Engineers, United States Army:

"It may be pertinent to suggest or point out that there have been reports having to do with conditions of the Eudora as well as the Atchafalaya, the purport of which is that the United States should buy them out and return them to the birds, the muskrats and the forests. I said 'No; that is the lowest possible conception of this matter, and I think that if I were a resident of these States, I would use a shot gun to prevent that.'" (Exhibit 16, p. 36.)

"As to the contention of those who think that the lower valley can be protected within the levees of the main stem, I would state our conclusion that in order to take care of floodwaters there must be taken out of the river a million cubic feet a second. There is no means that we know of holding any such amount of water, except and unless the United States would take up reservoirs throughout the entire country and, for the single purpose of withholding water, expend about \$1,260,000,000. We said to the House Committee last year that the reservoirs proposed for the Arkansas and White Rivers; at I think, an estimated cost of \$126,000,000, could be reckoned to withhold between 330,000 and 365,000 cubic second feet leaving still 700,000 or 650,000 cubic second feet to be removed from the river by floodways. If there is any other answer having to do with protection of the lower valley, we do not know it. We cannot uncover it, and we cannot discover it." (Exhibit 16, p. 37.)

"The approach that I made to the question of compensations had to do with some rational, equitable means of making due compensation without getting the United States into a

mass. of claims, condemnation, and expense, the amount or value of which I certainly could not report to Congress. \* \* \* In reporting upon this measure and in suggesting some amendments, I put my signature to the suggestion for compensation of twice the assessed value in Louisiana, and three times the assessed value in Arkansas, with the theory that that sum of money, in the aggregate—theoretically and practically, I believe—would pay the man who may be flooded once in 15 or 25 years and perhaps ultimately not at all, 80 per cent of what I presume its real value in Louisiana, and approximately the same amount—hit or miss a little bit—75 per cent of what I presume to be the real value in Arkansas.” (Exhibit 16, p. 38.)

“I repeat that a million second-feet must be taken out of that river unless you are going to have more and more disasters. I repeat that if we are to get this river under control, it is by this class of control, by building the levees and by the plan of taking out this water by means of spillways, or as you get reservoirs from year to year, bearing in mind that it is rather unthinkable that you should have a big proportion of them in less than 20 or 30 or more years. I would say to this committee what I said to the House Committee: ‘You must regard your reservoirs, as far as control is concerned, as just so much fat.’” (Exhibit 16, p. 38-39.)

“All I know is that we faced the problem of dealing with a vast volume of water to be taken out of that river, most people having no yardstick whatsoever as to what that volume of water is. We say it is 1,000,000 feet, and, in order to produce a yardstick that anybody can readily understand I would suggest that that is pretty nearly six times all the water that flows over Niagara Falls. It is pretty nearly five times all the water that flows down the St. Lawrence River to the sea; and I suggest, for your consideration, that the Corps of Engineers, being no miracle workers, cannot find the means of taking 1,000,000 cubic feet of water out of the Mississippi River five times the flow of the St. Lawrence River, and do it in any narrow fashion. We have to find the best means and stay with it.” (Exhibit 16, p. 43.)

170 “So far as we know, we are undertaking to pay out nearly the real value of all the lands that will be wet at all, and they have always been wet. There is not anything novel about the lands down in these floodways being wet. They have never failed to be wet. Therefore, the only thing the United States is proposing is that instead of having a sporadic indefinable crevass somewhere—and that is what we have always had in the past—we definitely put it down with

prediction, and pay the flowage for that purpose, and pay nearly the real value of every foot that is traversed by that water in that determined path." (Exhibit 16, p. 44.)

"Senator Caraway. You said it would be about 80 per cent of the value of the land in Louisiana.

"General Markham. We are proposing—I hope generously—to pay for flowage, and bear in mind it is flowage. It is not fee.

"Senator Caraway. Yes; I know.

"General Markham. We are proposing to pay for flowage 80 per cent of what would appear to be the real value.

"Senator Caraway. I understood you to say this morning that that does not take in the land that is overflowed, or anything like that; this is just for the lowage rights.

"General Markham. That is all. It is our privilege to flow these lands, leaving them in the hands of the people to cultivate them between the infrequent periods of flow. For that reason I am going to continue to emphasize the word 'generously'". (Exhibit 16, p. 48.)

"Senator Overton. \* \* \* let me just briefly ask you a few questions in order that the record may be brought up to date as to what progress has been made in executing the adopted plan. \* \* \* The northern section, as I understand it, extends from Cape Girardeau to the Arkansas. \* \* \* Is that work practically complete?

"General Markham. That work is practically complete and I think would take superflood. \* \* \* It would take superflood anyway, because the back levee has been built, and the water would go there.

"Senator Overton. Down to the Arkansas River there is no trouble in confining the water of the Mississippi between the leveed channels; is that correct?

"General Markham. I think that is a fair statement. \* \* \*

"Senator Overton. Let us swing down to the southern section from the latitude of the proposed Morganza floodway down to the Gulf. Is that work practically complete \* \* \*?

"General Markham. I think, in rough language, it is practically complete. \* \* \* It is essentially complete.

"Senator Overton. I want to ask you a few questions in reference to the situation on the south bank of the Arkansas River. The levees on the south bank of the Arkansas will,



of course, as I understand it, have to be maintained so as to prevent any crevass, if possible, because a crevass on the south bank of the Arkansas is likely to undo the good work you do all the way down the Mississippi Valley to the Atchafalaya.

"General Markham. Yes, and they are complete, as indicated by the black portion on the map . . . My understanding is that they are up to full superflood height.

"Senator Overton. What is the possibility of their being any crevass in the levees on the south bank of the Arkansas, in case of a major flood?

"General Markham. We do not see any reason to contemplate their crevassing any more than any other full-height levee.

"Senator Overton. Or even in a superflood, if there is going to be any crevass, the crevass would be more likely to occur somewhere else than on the south bank of the Arkansas?

"General Markham. There is no question about it—south of the Arkansas River on the main line." (Exhibit 16, pp. 49-51.)

"Senator Overton. . . . I want to ask you the direct question, and I think you have already given an unequivocal answer to it: Can floods in the lower Mississippi Valley be controlled successfully without the construction of either the Boeuf or the Eudora floodways?

"General Markham. They cannot be." (Exhibit 16, p. 64.)

171

## Exhibit 17.

From "Hearings before the Committee on Flood Control, House of Representatives, Seventy-Fourth Congress, Second Session, on S. 3531" (the Overton Bill which later became the Flood Control Act of June 15, 1936), dated April 30 and May 1, 1936, plaintiff read in evidence the following excerpts:

Colonel Graves, Corps of Engineers, U. S. A., testified:

"The 1928 act said that the United States shall provide flowage for the additional destructive floodwaters that pass by reason of diversion from the main channel of the Mississippi River, and that puts a burden indirectly on the War Department that they have never been able to carry, because there was not money enough in the appropriation to do any

such thing as that, and it has never been decided by the courts just what that means.

"This bill is drawn so that every man has his constitutional rights in court.

"In this bill we are prohibited from using the appropriations except as directed in this law. The previous law is not repealed and neither is it extended. This bill is not as liberal as that law, and our people felt that we could not properly ask for the repeal of the law, and we simply recommended what they should do. \* \* \*

"Those people have still got their case in court under section 4 of the 1928 act." (Ex. 17, p. 9).

"Mr. Rich. Would you mind defining, so far as your knowledge is concerned, what you think the 1928 act intended?

"Colonel Graves. I think it included a great deal more than has ever been paid for by certain of its provisions. I am not sure that the court will decide it that way because the limit of money authorized made it impossible. That law is not consistent. It says you will do a lot of things, and you have so much money to do them with, and you cannot do them.

"General Markham. I think the confusion has to do with the words 'additional floodwaters.' In this particular case we are taking these floodways and physically, by the work of the United States, directing these additional floodwaters over particular property, and that creates a Federal obligation.

"Mr. Rich. The reason I asked that question was because I know that Colonel Graves has been in the service for a great many years. He is not the youngest fellow we have around here. His knowledge and experience will be worth a lot, and I thought, if he would put that in the record, it would be not only good for the present time but for future generations. \* \* \*

My thought was this: General Markham and Colonel Graves both said that the law is not explicit and definite, and it has not been interpreted by the courts. I thought the experience of these two men was very vital in connection with an interpretation of the 1928 act, and it might be to the advantage of the country generally if they made an expression as to their interpretation of the 1928 act, so far as the law itself was concerned. \* \* \*

"General Markham. We are physically, deliberately putting additional floodwaters down in a certain territory, and thus deliberately creating an obligation for the acquirement of those flowage rights, believing that is the proper course for getting a diversion so that the whole river below will be protected in this, the only way we know how to protect it, confining it to a specific floodway. \* \* \*

"Mr. Main. What would you say as to the desirability of the bill with that project (the Eudora Floodway), taken out?

"General Markham. I think that the protection of the lower valley would be wholly incomplete, that it would remain in jeopardy." (Ex. 17, pp. 10-11).

Explaining the official Map of the Army Engineers for Flood Control adopted by the Act of May 15, 1928, plaintiff's Exhibit 3, General Markham testified: Everything in green on the map, everything other than the white, represents the area flooded in 1927. The 1927 flood was not a superflood. We regard the possibility of a flood down in that river that will carry from 350,000 to 400,000 more second-feet than went down the river in 1927. (Ex. 17, p. 16).

"General Markham. May I point out an analogy that I think is striking here? We have had recently very disastrous floods in Pittsburgh. It is not well known, but it is none the less the fact that the Corps of Engineers, in reporting upon the conditions of run-off and flood possibility in Pittsburgh, stated that Pittsburgh would be likely to be afflicted with a flood at a gage of 46 feet, due to the very thing that we are discussing now, an unfortunate conjunction of circumstances and otherwise, and I think that there were many skeptical people up in that territory that believed that there could be a flood where it would rise to 46 feet, but that is our recorded prediction at Pittsburgh, and, as you know, in this flood it reached a stage of 46.5.

"The lower valley can have precisely, in principle, that very consequence, and as we are dealing with these matters, and as the people down in the valley themselves will tell you, they wanted us to reduce our sights, lower our sights, as against the superflood. That is well known down there, and we won't give them an inch. We say, 'If you are going to be protected down there, you have to be protected against a superflood and not against a mere repetition of 1927', because the record would show a possibility of this possible conjunction or run-off from the various territories.

"We are convinced from our connection with such matters that the lower valley at some stage of the game will in fact be visited by a superflood, just as Pittsburgh was," (Ex. 17, p. 18).

"General Ferguson's (President of the Mississippi River Commission), statement is this: 'No statement made  
173 by me in newspapers was intended to infer that my views on the need of Eudora or other floodways have been changed from those given the House Flood Control Committee in 1935.'" (Ex. 17, p. 47).

### Ex. 17-B.

Act 139 of the Arkansas General Assembly approved February 19, 1923, entitled "An Act in aid of Southeast Arkansas Levee District," was offered in evidence, including the following provisions:

"It is hereby ascertained and declared that all real estate subject to overflow in said district (except the real estate included in the limits of any town or city in said district) is benefited annually to the extent of thirty cents (30c) per acre; and there is hereby levied and assessed against each and every acre of such real estate in the district, outside the limits of any town or city and subject to overflow, a tax of thirty cents (30c) per year. \* \* \*

"The tax annually levied in the foregoing section is a fixed tax; \* \* \*

"The Southeast Arkansas Levee District is hereby authorized to issue its negotiable bonds to the amount of and not exceeding three million dollars, interest payable semi-annually, at a rate not exceeding six per cent per annum. \* \* \*

"\* \* \* and for the purpose of securing the payment of said notes, certificates and bonds, and interest, a lien is hereby charged on all lands, \* \* \* and all other property in said district subject to levee tax paramount to all other liens." (Ex. 17-B; Special Acts of Arkansas, 1923, p. 260).

Plaintiff's land is in this district.

### Exhibit 17-C.

Act 260 of the General Assembly of the State of Arkansas, approved March 10, 1921, entitled "An Act in Aid of Cypress Creek Drainage District in Desha and Chicot Counties," au-



torizes a total bond issue of \$1,800,000, the payment of which is secured by a pledge of the benefits assessed by said district, which benefits are a lien on all real property in the district. Plaintiff's land lies in this district. (Ex. 17-C).

### Exhibit 18.

Act 3 of the Arkansas General Assembly approved April 13, 1934, entitled "An Act to Provide for the Redemption of Lands Lying Within the Southeast Arkansas Levee District and the Cypress Creek Drainage District, etc.,"

174 extending to property owners within said districts the period of redemption from forfeiture and nonpayment of annual assessments to January 15, 1935, recites:

"Whereas, the Congress of the United States has heretofore passed an Act known as the Flood Control Act and said Act provides that a portion of the Southeast Arkansas levees shall be used as a fuse plug, and

"Whereas, under the plans of the War Department a large portion of the lands lying within the Cypress Creek Drainage District and the Southeast Arkansas Levee District will be used as a spillway, and

"Whereas, no provision has been made by the Government for the payment for said lands so confiscated, and

"Whereas, the work has been rapidly carried on in all sectors under the Flood Control Act excepting within that portion known as the Boeuf River Spillway, and

"Whereas, the War Department plans to make a survey of said territory for the purpose of publishing said plans as to the taking of said lands, and

"Whereas, the people of Southeast Arkansas are unable to borrow money or to pledge their real estate as collateral for the purpose of carrying on business, and the property lying within said contemplated spillway has been ruined by reason of the enactment of said Flood Control Act, Now, Therefore,

"Be It Enacted by the General Assembly of the State of Arkansas:" (Ex. 18).

### Exhibit 19.

Act 103 of the Arkansas General Assembly approved March 6, 1935, extends the period of redemption to such property owners as plaintiff to January 15, 1940, and recites:

"Whereas, the Congress of the United States passed an Act known as the Flood Control Act, approved May 15, 1928; and

"Whereas, by said authority of the United States Government, large areas of land lying within the State of Arkansas have been taken and dedicated as a spillway and/or floodway, and other areas may hereafter be so taken; and

"Whereas, the Government has built levees, and under its right of eminent domain has taken levees, for the purpose of diverting waters over lands heretofore protected from flood waters, and may hereafter build and/or take other levees; and

"Whereas, at the present time Improvement Districts within the State of Arkansas, and the Trustees for Bond Holders, and individual property owners have filed suits against the Government to recover damages, for the taking of their property; and

"Whereas, the taking of such lands and property has destroyed values, and left property owners unable to pay  
175 their state, county and improvement taxes by reason thereof: Now, Therefore: Be It Enacted by the General Assembly of the State of Arkansas:" (Ex. 19).

### Exhibit 19 (2)

Public—738—74th Congress: "An Act authorizing the construction of certain public works on rivers and harbors, for flood control, and for other purposes," approved June 22, 1936, recites:

"Declaration of Policy. Section 1. It is hereby recognized that destructive floods upon the rivers of the United States, upsetting orderly processes and causing loss of life and property including the erosion of lands, and impairing and obstructing navigation, highways, railroads, and other channels of commerce between the States, constitute a menace to national welfare; that it is the sense of Congress that flood control on navigable waters or their tributaries is a proper activity of the Federal Government in co-operation with States, their political subdivisions, and localities thereof; that investigations and improvements of rivers and other waterways, including watersheds thereof, for flood-control purposes are in the interest of the general welfare; that the Federal Government should improve or participate in the improvement of navigable waters or their tributaries, including watersheds thereof, for flood-control purposes if

the benefits to whomsoever they may accrue are in excess of the estimated costs, and if the lives and social security of the people are otherwise adversely affected.

"Sec. 2. That, hereafter, Federal investigations and improvements of rivers and other waterways for flood control and allied purposes shall be under the jurisdiction of and shall be prosecuted by the War Department under the direction of the Secretary of War and supervision of the Chief of Engineers, \* \* \*"

"Sec. 8. Nothing in this Act shall be construed as repealing or amending any provision of the Act entitled "An Act for the control of floods on the Mississippi River and its tributaries, and for other purposes", approved May 15, 1928, or any provision of any law amendatory thereof." (Ex. 19 (2)).

#### Exhibit 20.

From the Flood Control Act of June 15, 1936 (Public No. 678-74th Congress) "An Act to amend the act entitled 'An Act for the control of floods on the Mississippi River and its tributaries and for other purposes' approved May 15, 1928" commonly called the Overton Bill, the following excerpts:

"That the Boeuf Floodway, authorized by the provisions adopted in the Flood Control Act of May 15, 1928, shall be abandoned as soon as the Eudora Floodway, provided for in Flood Control Committee Document Numbered 1, Seventy-fourth Congress, first session, is in operative condition and the back-protection levee recommended in said document, extending north from the head of the Eudora Floodway, shall have been constructed." (Ex. 20).

"Provided, that no money appropriated under the authority of this Act shall be expended upon the construction of the Eudora Floodway, the Morganza Floodway, the back protection levee extending north from the Eudora Floodway, or the levees extending from the head of the Morganza Floodway to the head of and down the east bank of the Atchafalaya River to the intersection of said Morganza Floodway until 75 per centum of the value of the flowage rights and rights-of-way for levee foundations, as estimated by the Chief of Engineers, shall have been acquired or options or assurances satisfactory to the Chief of Engineers shall have been obtained for the Eudora Floodway, the Morganza Floodway, and the area lying between said back protection levee and the present front line levees: Provided further, That easements re-

quired in said areas in connection with roads and other public utilities owned by States or political subdivisions thereof shall be provided without cost to the United States upon the condition that the United States shall provide suitable crossings, including surfacing of like character, over floodway guide-line levees in said areas for all improved roads now constituting a part of the State highway system, and shall repair all damage done to said highways within the said floodways by the actual use of such floodways for diversion: Provided further, That when such portion of said rights as to all of said areas shall have been acquired or obtained and when said easements required in connection with roads and other public utilities owned by State or political subdivisions thereof have been provided as hereinabove set forth, construction of said flood-control works in said areas shall be undertaken according to the engineering recommendations of the Report of the Chief of Engineers dated February 12, 1935 (House Committee on Flood Control Document Numbered 1, Seventy-fourth Congress, first session), and the Secretary of War shall cause proceedings to be instituted for the condemnation of the remainder of said rights and easements, as are needed and cannot be secured by agreement, in accordance with section 4 of the Flood Control Act of May 15, 1928: Provided further, That in no event and under no circumstances shall any of the additional money appropriated under the authority of this Act be expended for the acquisition of said 75 per centum of the flowage rights and rights-of-way hereinabove contemplated in excess of \$20,000,000: \* \* \* " (Ex. 20).

#### Exhibit 21.

From Public Document, Circular No. 417, United States Department of Agriculture, entitled "The Farm Real Estate Situation, 1935-36", October, 1936, the excerpt:

"The farm real estate situation during the year 1935-36 has been characterized by the continuation of the trend toward higher farm real estate values, more voluntary transfers and trades, and a smaller number of forced transfers occasioned by delinquency upon farm mortgage indebtedness or farm real estate taxes. \* \* \* The continued rise of farm real estate values brought the Bureau index of estimated average value per acre of farm real estate to 82 percent of the pre-war level." (Ex. 21).

Act 67 of the Arkansas General Assembly approved February 10, 1937, entitled "An Act to Enable the Levee and



Drainage Districts of this State to Comply with the Obligations and Requirements of the Federal Government to Control the Flood Waters of the Mississippi," etc., provides:

"Provided, nothing in this Act shall ever be so construed or applied as to relieve the United States of any liability or responsibility which it has assumed by the passage of the Flood Control Act of May 15, 1928, or the Flood Control Act of June 15, 1936, or any other existing law for the control of floods on the Mississippi River," etc. (Ex. 22, Sec. 2).

"Section 5. The State of Arkansas does hereby consent that the United States of America, the Secretary of War of the United States on behalf of the United States, or any of its agencies thereunto legally authorized, be, and each is hereby fully authorized, empowered and enabled, within this State, to exercise the rights of eminent domain and to obtain and acquire property and property rights, flowage rights, rights of way and servitudes or easements or options therefor in this State, either by voluntary agreements with the owners thereof, or by condemnation proceedings under the laws of the United States in pursuance of authority conferred by law in connection with any program or project of flood control, navigation, reclamation, reforestation, soil preservation, wild life refuge, agricultural development, reservoir, drainage, spillway, floodway or diversion channel for flood waters, and, upon the filing of any such proceedings, shall have the right to take immediate possession thereof to the extent of the interest to be acquired and proceed with such public works thereon as have been authorized by law, provided, that, in the event immediate possession is taken as herein provided, adequate provision shall have been made for the payment of just compensation to the party or parties entitled thereto; and provided further, that all such proceedings shall be diligently prosecuted in order that such compensation shall be promptly ascertained and paid." (Ex. 22).

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"Mr. Dyott: I now ask your Honor that the entire documents from which these excerpts have been read may be considered in evidence \* \* \*."

Mr. Williamson: These public documents have been offered in evidence "by reference," meaning that opposing counsel, in argument, before the Court, can quote from any part of any of the documents referred to.

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178 W. M. NEPTUNE, a witness on behalf of the plaintiff, testified:

I live in St. Louis, Missouri. I have actively engaged in the practice of civil engineering for about 33 years. Have been employed in the engineering corps of the Missouri Pacific Railroad for 31 years having prepared myself especially for hydraulic engineering in connection with drainage and flood control work. Since 1909 I have been assigned to that department of the Chief Engineer's office.

As an engineer I have studied the Flood Control Act of May 15, 1928, and the engineering plan thereby adopted described in House Document No. 90. I have a general knowledge of the construction work which has been done by the United States under authority of that Act, commonly called the Jadwin Plan. The lines of the Missouri Pacific Railroad Company extend through the entire alluvial valley of the Mississippi River covered by the Jadwin Plan from Cape Girardeau to the Gulf, making it necessary for us to keep in touch with that work throughout the entire valley.

Approximately 85% to 90% of the work in that levee system had been completed in the Fall of 1934; and approximately 90% to 95% of the system of the main river is completed at the present time.

With reference to the middle section of the Mississippi River, the levee lines on the east of the river have been raised and strengthened to the 1928 grades and sections authorized by the Flood Control Act of May 15, 1928; the levee on the south bank on the Arkansas River has been so enlarged and raised down to Yancopin. From Yancopin south on the west side of the Mississippi River to the vicinity of Lake Village the levee has been left at 1914 grade and section, 31 1/4 feet below the 1928 grade. From Lake Village south on the west side of the Mississippi River the levee has been brought up to 1928 grades and sections. This construction work by the United States has resulted in the creation of a fuse plug levee south of the Arkansas River as contemplated by the Flood Control Act of May 15, 1928.

179 For the first time in the control of the Mississippi River, the Flood Control Act of May 15, 1928, introduced in addition to levees the principal of diversion. Prior to that time the attempt had been made to protect the valley by levees only. It also established a full degree of Federal control over the protection system, which prior to the 1928 Act had been exercised by local interests under the supervision of the Federal Government.

The United States began actual construction of the unified, comprehensive project authorized by the Flood Control Act of May 15, 1928, commonly known as the Jadwin Plan, affecting the middle section of the Mississippi River, January 10, 1929, the date of the approval by the President of the recommendations of a Special Board authorized by section 1 of the Act. The construction work has gone on continuously since the final approval of the plan on January 10, 1929.

I have made surveys, and am personally acquainted with the fuse plug levee as compared with the levees north and south of the fuse plug levee on the west side of the Mississippi River, and as compared with the main stem levee east of the Mississippi River. The fuse plug levee is 3 feet lower and approximately just half as large by volume as those other levees constructed by the United States under the 1928 Flood Control Act.

Plaintiff's 40 acres of land is two miles west of the fuse plug levee at Arkansas City.

Exhibit 24 is a diagrammatic plat showing the location, and illustrating what is meant by the low inferior section of the levee called "the fuse plug levee" indicating how it is intended to function under the Flood Control Act of May 15, 1928.

This fuse plug levee as designed and contemplated by the Flood Control Act of May 15, 1928, is left low so it will overtop and relieve the main river levees of the amount of water which can not be handled between the present levee line at the adopted grade below this section of the river.

The fuse plug levee is from 3 to 3½ feet lower than the new levees which are constructed to the 1928 grade.

In September—October, 1935, we made an actual survey of the fuse plug levee, and prepared a graph which represents the condition of the levee at the time of the filing of the present suit. At that time the weakest point of the fuse plug levee which would most likely crevasse under the stress of a flood was in the vicinity of Cypress Point revetment, about 2 to 3 miles north of the bottle neck in the vicinity of Arkansas City. A bottle neck means where the levee lines are very close together constricting the floodway width of the river to an extreme amount as compared with the width above and below.

Since our survey in 1935, the United States has built a new set-back levee from the northern limits of Arkansas City to Chicora Landing in the vicinity of Possum Fork about 8

miles north of Arkansas City. The point on the fuse plug which is now weakest, and which will be the probable point of crevasse when tested by a major flood is about Lucca Landing; about 2 miles north of this new set-back levee. Through this crevasse the water would go right into the Boeuf Floodway. This is in the section of the levee which is designed to open up into the floodway.

When this suit was filed in 1934, the fuse plug levee I have just described was in such condition that it would be overtopped and breached to provide for the escape of flood waters as was designed and contemplated by the Flood Control Act of May 15, 1928; and that condition still exists. The fuse plug levee has been in such operative condition as contemplated by the Flood Control Act of May 15, 1928, for the past 5 or 6 years.

I have surveyed the plaintiff's land involved in this suit, described as the SW $\frac{1}{4}$  of SW $\frac{1}{4}$  of section 31, Township 12, South, Range 1, west, and am personally familiar with it.

Exhibit 25 is a plat of the topographic survey. The 181 map shows how much the plaintiff's land is below the top of the fuse plug levee—the fuse plug levee showing an elevation of 60.5 feet.

Plaintiff's property is practically in the middle of the entrance of the Boeuf Floodway as designed by the Flood Control Act of May 15, 1928.

I have personally inspected the levee line from Pine Bluff on the south bank of the Arkansas River to Yancopin. For the past 5 or 6 years, and at the time the present suit was filed, the plaintiff's property has been reasonably protected against any future floods from waters escaping from the south bank of the Arkansas River.

The plaintiff's property has been definitely subjected to a different flood hazard from that to which it was subjected at any time prior to the construction work done by the United States pursuant to the provisions of the Flood Control Act of May 15, 1928. The levees on the west side of the river above and below the fuse plug, and the levees on the east side of the Mississippi River, and the levee on the south bank of the Arkansas River have all been raised about 3 feet or more above the grade line of the low fuse plug levee. Major floods will undoubtedly overtop this low-line levee and put the spillway and floodway into operation and release the waters to pass over the Sponnenbarger property into the floodway. This definitely locates the flood menace and make certain during major floods the release of the necessary flood



waters onto this property, and in close proximity to it. Heretofore there was a possibility of overflows at points remote from this property. Now it is very definite that such overflows in major floods will come at points close to this property.

182 The word "diversion" used in the Flood Control Act of May 15, 1928, I understand to mean the taking water out of the main channel of the Mississippi and passing it laterally into a detour or route around the main channel in order to handle the amount of water in excess of the capacity of the levee system below the point of diversion. At the time the present suit was filed, and since, additional destructive flood waters will pass over the plaintiff's property by reason of diversion from the main channel of the Mississippi River, overtopping the fuse plug levee at gages somewhere around 59 feet on the Arkansas City gage as shown by our survey and profile of that low levee line.

In order for levees along the Mississippi River to hold the project flood contemplated by the Act of May 15, 1928, the fuse plug levee in the vicinity of Arkansas City would have to be raised approximately 19 feet. If the flood of 1927 had been confined in the main channel of the river by levees at their present location the water would have reached a stage of approximately 69 feet along the fuse plug levee at Arkansas City. In its present condition the fuse plug levee would hold water only to a stage of 59 feet.

A diversion channel on the west side of the Mississippi River in the middle section is a specific requirement of the 1928 Act, and is absolutely necessary for flood control under the provisions of that Act. The levee grades below the suggested diversion approved and adopted under the 1928 Act are not sufficient to carry the amount of water of a 1927 confined flood.

If a flood crest in the Mississippi River exceeds the present height of the fuse plug levee at its weakest and lowest point the levee would be overtopped and would crevasse and would start to flood through the floodway and diversion. That would take place on this property and the head of the floodway with full crevasse effect. The release of a volume of water which has been held up against the levee some 20 feet deep on empty ground would result in destructive velocity with damage to the property in the head of the diversion section. Plaintiff's land is less than a mile from the fuse plug levee at the closest point. Her land is about 2½ miles from the fuse plug levee at Arkansas City.

Her land is 8 miles from the weak section of the fuse plug levee at the upper end of the new set-back levee in the vicinity of Possum Fork.

When the fuse plug levee is overtopped the water in the river will stand 20 feet above the elevation of plaintiff's land less than a mile away.

The fuse plug levee can not be safely overtopped to any depth without a crevasse being reasonably certain. When a crevasse does occur the levee will probably wash away down to the natural level, and more than likely it will scour below the natural elevation of the ground forming "blue holes" to a minimum depth of 30 to 40 feet, although they might exceed that depth considerably.

No part of this fuse plug levee breached or crevassed during the 1927 flood. Crevasses in the Arkansas River levee and crevasses on the east bank of the Mississippi River upstream from Arkansas City relieved the stages in the river to such an extent that the fuse plug levee was not overtopped. The crevasse in Mississippi in 1927, opposite the fuse plug levee, discharged 500,000 second-feet or more of water.

The soil in Mississippi is light and sandy as compared with heavy buckshot soil on the Arkansas side. Levees of equal grade and section in Arkansas and Mississippi along the fuse plug area would give the Arkansas property a distinct advantage in a flood fight on account of the sandy soil and seepage on the Mississippi side of the river.

Any flood beyond that of a magnitude of around 30% less than the 1927 flood, of the type of the 1927 flood, would overtop and crevasse the fuse plug levee. Any flood beyond the magnitude of the flood of 1927 less the amount of water which passed out through the crevasse in the Mississippi side levee and the Arkansas River levee would overtop and crevasse the fuse plug levee. For the past 5 or 6 years any flood approximately 30% less than the 1927 flood would have overtopped and crevassed the fuse plug levee.

Under the conditions contemplated by the Flood Control Act of May 15, 1928, in a flood the size and type of the 1927 flood from 800,000 to 900,000 cubic second-feet of water would escape down the Boeuf Floodway in the latitude of Arkansas City. The 1928 Act contemplates a flood 25% to 30% in excess of the estimated 1927 flood, called the project flood, which would necessitate the escape of more than 1,000,000 cubic sec-

ond-feet of water through the fuse plug levee down the Boeuf Floodway.

185 The Flood Control Act of May 15, 1928, is designed to take care of a project flood of approximately 3,000,000 second feet in the vicinity of Arkansas City. Approximately 2,000,000 cubic second feet of flood water came out of the Ohio River in this 1937 flood. The largest measured flood out of the upper Mississippi River at St. Louis was 1,146,000 cubic second feet in 1892. The largest measured discharge of the Arkansas and White Rivers into the main channel of the Mississippi River was 1,152,000 cubic second feet in 1927. The sum of these three measured discharges in the past from the Ohio River, the upper Mississippi River, and the Arkansas and White Rivers, is 4,399,000 cubic second feet.

Should the present fuse plug levee breach at the point I think most probable, the water flowing over plaintiff's land would be from 17 to 20 feet deep. Before the floodway filled up, when the crevasse was first opening up, plaintiff's property is close enough to the levee line for a velocity of from 10 to 15 feet per second, being 6 to 10 miles per hour. Such velocities are destructive. This would mean something like a volume of 130,000 cubic second feet of water flowing over plaintiff's property. Most all movable property would be destroyed and lost. Ground value would probably be lost through scouring and filling. Scouring means removing the top soil and washing it away. "Filling" means loss of value to the soil by the filling up of the floodway with sand deposited over the land to such a depth it would no longer be suitable for cultivation. The plaintiff's property being much closer to the floodway entrance than it was to the points of the levee which crevassed on the Arkansas River in 1927, future damage to plaintiff's property from any future flood using the floodway would be much more than in 1927. Under the present law and the conditions resulting therefrom, it is

certain that the fuse plug levee will crevasse in the  
186 event of a flood of the size and type of 1927, and larger. There is no chance of the fuse plug levee holding with the levee lines all around it three feet higher and built to carry three feet more of water than this fuse plug levee. The functioning of the fuse plug levee as contemplated by the Flood Control Act of May 15, 1928, is certain.

The construction of the guide levees in the Boeuf Floodway is in no way essential to the functioning of the fuse plug levee. They limit the amount of land that may be subject to floodway flow. They do not limit the entrance. So far as damage to

the plaintiff's property is concerned the constructing of these guide levees would have very little effect one way or the other.

I am familiar with the Markham Plan contemplated by the Flood Control Act of June 15, 1936. Plaintiff's property is in the floodway regardless of which plan may be ultimately executed.

As a result of the engineering facts to which I have testified, under the conditions which have resulted solely from the execution of the Flood Control Act of May 15, 1928, I do not think anyone in the exercise of good judgment could build any improvements of any consequence in this floodway, because of the continued hazard of overflow. The protection realized in the past is no longer assured. The property in this particular restricted area is assured of having to take overflow whenever there are major floods.

Plaintiff's property has never been overflowed before by waters diverted from the main channel of the Mississippi River at the point where the fuse plug levee will now breach. The bank full stage of the River at Arkansas City is 44 feet on the Arkansas City gage of the Mississippi River Commission—42 feet on the gage used by the Weather Bureau.

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#### Cross-Examination.

In 1927 the Sponenbarger property was overflowed somewhat less than 15 feet from crevasses in the Arkansas River levee above Red Fork. That levee has been restored and raised on the Arkansas River. The flood hazard has been transferred by carrying out the Jadwin Plan from the vicinity of the levee lines on the Arkansas River to the lower levee lines in the vicinity of Arkansas City, closer to the property. The 1927 crevasses were 35 miles from plaintiff's property.

Plaintiff's property was flooded in 1912, 1913 and 1916, when water from the Mississippi River came through Cypress Gap, and in the early years at the start of the levee system, it was subject to previous overflows above Arkansas City on the old levee line before the Cypress Creek Levee gap was built.

In advance of the 1937 flood the United States did some temporary work on the fuse plug levee by raising it to the 1914 grade at points where the crown was below the 1914 grade. Not very much was done.



The lowest point in the fuse plug levee in 1935, was approximately 3 miles from Arkansas City and the Sponenbarger property, just North of the new set-back levee built also to the 1914 grade, like the original fuse plug levee. (Rec. 185-186).

Since the passage of the Flood Control Act of May 15, 1928, the fuse plug levee has never failed or gone out. It is effective to its height.

In the 1937 flood approximately 2,100,000 cubic second feet passed Arkansas City at a gage of 53.8. In 1929 1,800,000 cubic second feet passed at a gage of 58.5. The difference in the type of floods causes the difference in the gage. The same reading on the gage during different floods, and during different floods the same year, does not necessarily indicate that the same flow of water is passing through the river. The 1929 flood and the 1937 flood were wholly different as to rate of rise, and other conditions. Conditions were different at the mouth of the White and Arkansas Rivers.

The Government has not taken any dirt off this fuse plug levee, or lowered it, or reduced it from its former grade. It is virtually the same as it was in 1927.

#### Redirect Examination.

The set-back levee recently constructed just North of Arkansas City was constructed to the 1914 grade and section. These grades and sections were established by the Mississippi River Commission. The grade is the controlling elevation. The 1914 grade generally means in the vicinity of Arkansas City that you have a line governing the elevation of the top of the levees which is equal to a gage reading of 60.5 on the Arkansas City gage, and generally parallel to the slope of the high water planes of the River. Similarly, the 1928 grade is a grade established on the gage at Arkansas City of 63.5, and having a slope which generally parallels the previously experienced flood elevations along the levee lines. The section adopted and established by the Mississippi River Commission following the adoption of the 1914 section is different from that of the section used under the adopted 1928 section. While the 1914 grade had a banquetted rear slope section, the 1928 grade is one continuous back slope section. Grade refers to elevation, and section refers to width of the levees. The Mississippi River Commission is an agency of the War Department of the United States Government.

Any flood coming out of the White and Arkansas Rivers joining with that of the upper Mississippi River that can safely pass through the constricted channel of the Mississippi River known as the bottle neck near Arkansas City, can be safely carried through the widened channel South of the bottle neck and past the fuse plug levee. The fuse plug levee would crevasse, if at all, in the upper portion of the fuse plug levee before reaching the bottle neck.

The levee grades from Helena to Arkansas City down to Vicksburg are predicated upon the fact that the fuse plug will break in the vicinity of the mouth of the Arkansas River, and the levee grades as established are based on the fact that with such relief there can be only approximately from 3 to 3½ feet lower from Arkansas City South, while the raise at Helena is approximately 8 feet, and the difference in levee grades at Helena is approximately 8 feet. The failure of the fuse plug levee to function would endanger the levees to the North. The most efficient point for the diversion and for the preservation of the levee grade lines North is in the vicinity of the mouth of the Arkansas River, at or about the old Cypress Creek gap. The greatest relief in the diversion occurs when the levee opens up on the upper end of the floodway nearest to the points of critical stages which you wish to relieve. The breach of the levee in the general vicinity of Lucca Landing is closest to the head of the fuse plug section, and would serve the purpose most efficaciously.

The restoration of the 1927 crevasses in the levees on the South bank of the Arkansas River from Pine Bluff down to the fuse plug began immediately after the 1927 flood. The work of restoration was in actual progress before the 1928 Flood Control Act was passed.

The volume of water which would now flow over the Sponenbarger property in a flood like that of 1927, than did actually flow over it in 1927, because of the construction work done under the Flood Control Act of May 15, 1928, would be increased in its minimum quantity by the amount of water which went over the Mounds Landing (Mississippi) crevasse, and into the Yazoo Basin (Mississippi) East of the River, which must now be taken through the fuse plug levee on the West—500,000 cubic second feet. And actually there is an accumulation of all the crevasse water above Helena which occurred in 1927 which was transferred to the mouth of the Arkansas and White Rivers, which must now be relieved by the operation of the fuse plug section if those levee lines are not to be in danger. Now the water would be deeper on plaintiff's property. com-

ing from a closer breach in the levee system, and have a higher velocity than the water which came in 1927. Under present conditions the water would be from 20 to 25 feet deep on plaintiff's property.

Floods are of different type. Generally, no two floods are alike, nor have the same characteristics so far as levee protection is concerned. There are short, quick floods and long, slow floods; and between the two there is any possible number of combinations which have occurred. In 1927 the storage back-water basins were full of water. All the tributaries were in flood. In the 1937 flood these storage back-water basins were comparatively empty. The single flood wave originated almost entirely in the lower Ohio River, passing through and down the Mississippi River into comparatively low water conditions, with only minor contributions of the tributaries at the time of the passage of the high crest. The 1937 Ohio River flood is referred to as a "flash flood". Very little water was coming out of the upper Mississippi. The Arkansas and White Rivers were at relatively low stages when the crest from the Ohio River flood reached their mouths. Had the large storage basin at the mouths of the Arkansas and White Rivers been full in 1937 when the crest of the Ohio flood reached that latitude, as they were in 1919-1927, the fuse plug levee would have been overtopped.

Even if half as much water had come out of the Arkansas and White Rivers in 1937 to join the crest of the Ohio flood, as did come out of those Rivers in 1927, the fuse plug levee would have been overtopped.

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S. L. Woxson, on behalf of plaintiff, testified:

I live in St. Louis, Missouri; am Assistant Chief Engineer of the Engineering staff of the Missouri Pacific Railroad Company. I have been a practicing civil engineer for 36 years. I took an engineering degree at the University and at the Massachusetts Institute of Technology. Since 1932 I have been in charge of all the engineering work of the Railroad Company. Our railroad lines extend from St. Louis to New Orleans in the alluvial valley of the Mississippi River, and it has been necessary for us to study the Flood Control Act of May 15, 1928, and to keep generally in touch with the regimen of the River and plans for its control. I am familiar with the engineering plans presented by House Document No. 90 authorized to be prosecuted by the 1928 Act, and have a general knowledge of the engineering construction work which has been done by the United States under authority of that Act.

In August, 1934, when the present suit was filed, the project was probably 80% complete. It is now substantially complete except for guide levees in certain floodways and front line levees designed as so-called fuse plug. (Rec. 229-230).

The Flood Control Act of May 15, 1928, for the first time in Mississippi River flood control plans, introduces a diversion of water from the main channel of the River as a feature of flood control. Plaintiff's property, SW $\frac{1}{4}$  SW $\frac{1}{4}$  of Section 31, Township 12, South, Range 1, West, just West of 192 Arkansas City in Desha County, Arkansas, is in one of the floodways that has been created by this plan as a channel for that diversion. The United States began actual construction of this comprehensive project authorized by the 1928 Flood Control Act, commonly known as the Jadwin Plan, in January, 1929, and the work has continued right along until in 1934 it had reached the stage of approximately 80% complete.

I am familiar with the physical conditions at the head of the Boeuf Floodway, and the purpose of the fuse plug levee as designed and contemplated by the Flood Control Act of May 15, 1928. The Federal agencies determined that levees alone were inadequate to provide flood control. A general raising of the levee grade more than 3 $\frac{1}{2}$  feet was deemed impractical, and such levees were not high enough to carry such a flood as that of 1927. It therefore became necessary to provide some other means of taking care of the water that could be expected in future floods, and the means determined on was to provide several lateral floodways, one of which, in the middle section of the River, was the Boeuf valley whereby sufficient water would be diverted from the main channel of the River to prevent the breaking of the levees below. This floodway, and the functioning of the so-called fuse plug at the head of the floodway, is to crevasse and open at the predetermined elevation of the flood and permit water to escape, thereby holding the flood discharge below the fuse plug to an elevation which can be safely carried by the levees.

At the time this suit was filed in 1934, and at present, the fuse plug levee is from 3 to 3 $\frac{1}{2}$  feet lower, and of less massive section, than the West line levees above it and below it, and, than the levees on the East side of the River in Mississippi. I made a general examination of the fuse plug levee in the fall of 1935, accompanied by my associates, and 193 we came to the unanimous conclusion that the location on the fuse plug that would very probably crevasse first as contemplated by the Flood Control Act of May 15, 1928, if a flood occurred, was at a place called Chicora, about



6 miles above Arkansas City. We found a combination there of a caving bank and a concrete revetment being destroyed, leaving the levee subject to destruction by flood. The fuse plug levee at that location was below the 1914 grade. I urged that that situation be taken care of and later the United States constructed a new levee behind the old levee, further back from the River, commonly called a set-back levee which, under the law, was also at the 1914 grade and section, the same as the rest of the fuse plug levee.

After the building of that set-back portion of the fuse plug levee, the point of the present fuse plug levee where a crevasse will probably first occur during a flood is near the upper end of the new set-back levee, near Lucca Landing.

This inferior section of the levee where water would pass over it because of its pronounced difference in elevation to the other front line levees raised to the 1928 grade, has been in a condition to function as a fuse plug levee as designed by the Flood Control Act of May 15, 1928, since 1931 or 1932.

I am familiar with the plaintiff's land involved in this suit. It is in the Boeuf Floodway about 6 miles below where the fuse plug levee will most likely first crevasse.

The levees along the South bank of the Arkansas River have been raised and strengthened to the new 1928 grade, whereas the fuse plug levee has been left at the inferior 1914 grade, thereby making it substantially certain in all human probability that the fuse plug levee will fail before 1940 - the levee on the South bank of the Arkansas River will fail. This has been true since 1932. Plaintiff's property, since 1932, is reasonably protected against any future flood water escaping from the South bank of the Arkansas River.

The construction work done by the United States pursuant to the provisions of the Flood Control Act of May 15, 1928, has created a different degree of flood hazard or menace to plaintiff's property in that previously her property had more or less of an even break with all the other property in the alluvial valley. Crevasses along the river might be at various places. Under the present plan and law, the location of the levee failure in the middle section of the river has been pre-determined at the fuse plug whenever the floods are sufficient to cause the fuse plug to operate. Plaintiff's property has been subjected to a greater magnitude of overflow by the increase of height of levees to the 1928 grade, increasing the height of major floods and the depth of the overflow which passes out through the fuse plug when the fuse plug operates.

An essential feature of the adopted plan is that the fuse plug levee shall be overtopped, and shall remain open, when the river reaches the stage of 60.5 feet on the Arkansas City gage. In all human probability that fuse plug levee will function as is contemplated by the Flood Control Act of May 15, 1928. This has been true ever since the front line levees on the East side of the river, and the levees on the West side of the river North and South of the fuse plug have been raised to the new 1928 grade and section—since about the year 1932, I believe.

When the flood stage of 60.5 feet on the fuse plug levee is reached, and the river continues to rise, the water will flow over the fuse plug and will gradually wash away or 195 crevasse the fuse plug levee so as to hold the flood stage in the river itself at about 62.5 feet on the Arkansas City gage. This is an essential feature of the plan. This will cause a flow in the floodway to pass over plaintiff's property, building up sufficient velocity and depth to practically destroy all improvements upon it, fill up the ditches, float away all buildings, destroy the fences, wash away the top soil or deposit sand and material upon it, practically cutting off the productiveness of the property.

The fuse plug levee will probably fail at its upper end near Lucca Landing because it will naturally be overtopped where the flood first hits it coming down the river from the mouth of the Arkansas at the upper end of the fuse plug. Such is the definite, asserted intention of the plan. The fuse plug levee may fail from other causes than overtopping, such as inadequate foundation, producing seepage, where the levee crosses old water courses that formerly discharged into the river. Above Arkansas City there are two points of possible weakness of that kind, one called Mills Bayou and another at Possum Fork, near Lucca Landing. At Possum Fork the main current of the river is right against the levee and it is a notoriously bad levee foundation in that vicinity. I would look for a failure to be right at or near that point.

When levees overtop and crevasse they usually wash away to their natural depth, and right at the crevasse the natural ground washes away to a considerable extent, forming a "blue hole". The water in the river outside the levee is considerably higher than the land behind the levee, and when the levee fails the water goes through from the river in a torrent head and scours out the ground behind the levee in what is called a "blue hole". The blue hole at Luna Dyke is 80 feet deep.

196 No part of this fuse plug levee failed, or was overtopped, during the 1927 flood. When the flood water was near the top of the fuse plug levee at Arkansas City, it was relieved by crevasses on the East side of the Mississippi River at Mounds Landing, and crevasses on the South bank of the Arkansas River at Pendleton and Medford. In all human probability there will be no more crevasses on the South bank of the Arkansas River because it is specifically a part of the plan of the Flood Control Act of May 15, 1928, and of the construction work done under that plan, that such crevasses shall not again happen. The Act is designed to prevent these reliefs to the fuse plug levee.

It is generally considered that a flood of the 1927 type, but of less total discharge, would put the fuse plug in operation. Roughly that can be measured by the amount of relief that occurred when the fuse plug was about to be overtopped in 1927 by discharging through the crevasses in that vicinity representing a volume of the 1927 flood something between one-third and one-fourth. Since the creation of the fuse plug by work on the other front line levees as contemplated by the Flood Control Act of May 15, 1928, which would be since approximately 1932, a flood approximately one-third to one-fourth less than the volume of the 1927 flood of that type would cause the fuse plug levee to breach and the floodway to function as planned by the law. A flood of the size and type of the 1927 flood would discharge at least 600,000 cubic feet per second down the Boeuf Floodway as contemplated by the Flood Control Act of May 15, 1928. The project flood contemplated by the Flood Control Act of May 15, 1928, would flow approximately 1,000,000 cubic feet per second in the Boeuf Floodway.

In the event of a breach of the fuse plug levee at the point where it will most probably occur, under the conditions contemplated by the Flood Control Act of May 15, 1928, 197 the flood waters will reach a depth on plaintiff's property in a flood like that of 1927 greatly exceeding the depth to which plaintiff's property was actually flooded in 1927. Much more water will now come down the Boeuf Floodway.

The guide levees on either side of the Boeuf Floodway as prescribed by the Flood Control Act of May 15, 1928, have not been constructed. Their construction would have no substantial effect upon the plaintiff's property. The guide levees are not necessary to the operation of the fuse plug levee as contemplated by the 1928 Act. The fuse plug levee

is now serving the purpose for which it was designed under that Act. This has been true for 5 or 6 years.

If the fuse plug levee were built up to the 1928 grade and section like the levees North and South of the fuse plug, and like the levee on the East bank of the river in Mississippi opposite the fuse plug, we would have restored the condition that existed prior to the plan of the 1928 Act when the entire valley had an even break. In any flood equal to that of 1927, or greater, the levees would breach at some point between Cairo and the Red River.

The plaintiff's property has never been overflowed by a planned diversion from the main channel of the Mississippi River. There never was a planned diversion prior to the Flood Control Act of May 15, 1928, and since that time the plaintiff's property has not been overflowed.

"The project flood" contemplated by the Flood Control Act of May 15, 1928, is not the greatest possible maximum flood that can come down the river; and does not purport to be.

The Boeuf Floodway was not the only possible method for taking care of excess water from the Mississippi River. The plan itself reviews a number of alternate possibilities, and selects this.

198 There is a difference between a natural outlet from the river and an artificial diversion. A natural outlet is one that exists in a state of nature, as may be found by a creek entering the river which at times of flood receives the flood flow of the river; whereas a planned diversion is an arrangement artificially set up to insure that at predetermined stages water will pass through the protecting work, such as in this case the levee line.

In the report of the Chief of Engineers for 1919, No. 3, page 3715, and in the annual report of the Chief of Engineers for 1920, Part 2, page 2999, after various studies had been made of the gap in the levee at Cypress Creek which formerly was a natural outlet and allowed the water to escape from the Mississippi River down the Tensas Basin, property owners were given the assurance that the closure of that gap would give absolute flood protection in succeeding years. In the report of the Chief of Engineers for the year 1926, after the levee had been built across the mouth of Cypress Creek closing the gap, the statement is made that the flood control works were then in a condition to prevent destructive damage by floods.



The magnitude and frequency of future floods are not predictable in America. It requires an interval of scientific observation of the regimen and behavior of a river anywhere from 500 to 1000 years before we can predict the magnitude and frequency of major floods. We do not have in any part of America sufficient background and bases for these observations. We have less than 100 years; in fact, less than 50 years of any reliable records and observations. Any statement that the Boeuf Floodway will be used on an average of once in ten years, or once in fifteen years, or once in any other period of years, is essentially speculative. No such statement can be made with safety or confidence.

199

## Cross-Examination.

The levees on the South bank of the Arkansas River were raised to the 1928 grade and section five or six years ago, and recently this has been extended to the railroad crossing at Yancopin. The territory North of the Arkansas River is a vast storage territory for back water. The front line levees on the East bank of the Mississippi River have been raised and strengthened since 1928 to the 1928 levee grade and section to prevent flood waters from escaping from the main channel of the Mississippi River. The Government has created a floodway in Missouri, primarily to lower the maximum crest at Cairo and prevent the Cairo levees from being overtopped. A floodway has been created in the Atchafalaya Basin to hold the stage of water in the main channel above Red River to the capacity of those levees. Bonnet Carre Spillway has been introduced directly above New Orleans as an additional safeguard to take out of the main channel about 250,000 second feet and send it into Lake Pontchartrain. The plan provides for a certain amount of channel improvement in the way of dredging and revetment which has been carried on. These are the main features of the work done by the United States since 1928. The entire levee line, except the fuse plug levee, has been raised  $3\frac{1}{2}$  feet.

In the few years of which we have the record, there is no record of such a flood as the "project flood" contemplated by the Flood Control Act of May 15, 1928.

The fuse plug levee protecting the plaintiff's property has not been physically changed or altered by the Government adopting the Jadwin Plan; relatively its protection has been reduced. The Sponenbarger property does not have the same relative protection from the fuse plug levee that it had prior to May 15, 1928, notwithstanding the levee is at the same physical height and the Government has not yet caused

200 any water to pass over this levee. The property does have higher levee protection on the South bank of the Arkansas River.

### Redirect Examination.

The reason plaintiff's property has relatively less protection from the fuse plug levee since the passage of the Flood Control Act of May 15, 1928, is that other front line levees have been raised. If all front-line levees were raised throughout there would be a uniform measure of protection; but where the front line levees are raised and strengthened except for a certain section which is left at an inferior grade, left in a more vulnerable state, the property behind the inferior levee has relatively less protection than it had before. This creates a condition which is the same as if the entire levee line had been left alone except to cut down a part of the existing levee.

P. T. SIMONS, on behalf of plaintiff, testified:

I live in St. Louis, Missouri. For eleven years have been Assistant Engineer in the Engineering Department of the Missouri Pacific Railroad Company, the principal portion of my work being on drainage and flood control problems affecting the lines of that Railroad. I have practiced my profession for thirty-three years since graduating at Purdue University. I have studied hydraulic flood control and drainage, and in 1924 prepared a thesis on Flood Control and Drainage in the basin of the Red River, for which I received a degree from Purdue University. I worked for the United States Department of Agriculture in twenty states as senior drainage engineer, my last year of such service being in Desha County, Arkansas, investigating the drainage and flood control problem of the Cypress Creek Drainage District in Desha and Chicot Counties, Arkansas. I have been familiar with the Sponenbarger forty acres of land for more than ten years.

201 I am familiar with the map of the Cypress Creek Drainage District, referred to as "Figure 3" in Act 80 of the General Assembly of the State of Arkansas, approved February 25, 1915, creating the Cypress Creek Drainage District. I was in Desha County, employed by the U. S. Department of Agriculture, measuring and investigating drainage, surface run-off, and flood control problems of the land in Cypress Creek Drainage District covered by this Figure 3 of U. S. Department of Agriculture Bulletin 198, Exhibit No. 26.

This plan of drainage was developed in order to divert the flow of Cypress Creek southward into natural drainage channels in order to permit the levee system along the South bank of the Arkansas River to be extended and connected with the levee system starting at the mouth of Cypress Creek and extending down stream along the Mississippi River to and below the Arkansas-Louisiana line. I am familiar with the history which [lead] to the closing of the opening of this Cypress Creek into the Mississippi River leaving a gap in the levee there. In the early eighties levees had been extended from Pine Bluff along the South bank of the Arkansas River to a gap of about 14 miles at the mouth of Cypress Creek before the levee began along the Mississippi River which extended down stream to the mouth of Red River in Louisiana. Various reports were made on this gap by the Mississippi River Commission and by the Corps of Engineers of the United States Army. The property owners whose land was subject to overflow by water which escaped from the Mississippi River through this gap in the levees at the mouth of Cypress Creek finally established the Cypress Creek Drainage District by a special Act of the Arkansas Legislature for the purpose of closing this gap in the levees at Cypress Creek. In order to do this, they were required by the Federal Government to divert the waters of Cypress

202 Creek downstream on the landward side of the Mississippi levee before the Federal Government would permit the Cypress Creek gap to be closed. Contracts were let extending the levee on the South bank of the Arkansas River downstream, thus narrowing the gap at Cypress Creek and limiting the amount of water that would flow out of the Mississippi River through the gap. These contracts were under the general supervision of the Mississippi River Commission and the Corps of Engineers of the United States Army.

The work of drainage by the Cypress Creek Drainage District progressed sufficiently for the Mississippi River Commission to permit the actual complete closing of the Cypress Creek Gap, so as to make the levee line without a break in what has now become the fuse plug levee, in 1921. Since that time there has never been an overtopping or crevassing of that portion of the levee at the head of the Boeuf Floodway.

I am familiar with the engineering plan set forth in House Document No. 90 which was adopted by the Flood Control Act of May 15, 1928. I have kept in close touch with the building of the levees along the Mississippi River and the South bank of the Arkansas River, making frequent visits to

the Mississippi River Commission office and the United States District Engineers' Office in Vicksburg, and making personal inspections in the field in order to keep informed as to the status of the work on the adopted plan. Approximately 80% of the plan authorized by the Flood Control Act of May 15, 1928, had been completed at the time the present suit was filed in August, 1934. The 20% incomplete represented the building of the guide levees on each side of the Boeuf Floodway and the Atchafalaya Basin. These guide levees have not yet been built in the Boeuf Floodway. 90% of the original project has now been completed.

203 When the present suit was filed in 1934, the project had been sufficiently completed for approximately five years for the fuse plug levee at the head of the Boeuf Floodway to function as was designed by the Flood Control Act of May 15, 1928. That stretch of the levee has actually served as a fuse plug levee, as designed by the Act, since 1932.

The work done by the United States under the Flood Control Act of May 15, 1928, especially as it has been effective since approximately 1932, has established the Boeuf Floodway in operating condition, and plaintiff's property being within the Floodway has been in jeopardy of overflow when the floodway goes into operation.

Before the Flood Control Act of May 15, 1928, plaintiff's property was provided with the same degree of levee protection against overflow as other property in the State of Arkansas and the State of Mississippi. The 1928 flood control plan placed this property in the Boeuf Floodway. The United States Government began work on the actual construction of this project, authorized by the 1928 Act, approximately January 10, 1929.

Treating the plan as a whole, the fuse plug levee is designed and contemplated by the Flood Control Act of May 15, 1928, as an inlet for diverting water from the Mississippi River into the Boeuf Floodway when the stage of the river reaches a gage height of 60.5 feet at Arkansas City. The purpose of this diversion is to prevent floods from overtopping the levees on both sides of the Mississippi River above and below this diversion and on the South bank of the Arkansas River. By using that portion of the area in the Boeuf Floodway for the purposes stated, the other five-sixths of the entire alluvial valley of the Mississippi River is protected against flood. One-sixth is used for a floodway.



204 I was a member of the surveying party that made the survey of plaintiff's forty acres of land in 1935 shown by Exhibit 25, and am personally familiar with the elevation of each part of the forty acre tract as reflected by this map. I was a member of the surveying party that made the profile of the fuse plug levee referred to by Mr. Neptune, and am personally familiar with the actual elevations and conditions of the fuse plug levee as it affects this property.

For about three years prior to 1935, a crevasse in the fuse plug levee would most probably have occurred at some point near Chicora Landing, about 5 miles upstream from Arkansas City. The top of the levee there was at a low elevation with reference to the 1914 grade line, and there was a caving bank on the river a short distance from the toe of the levee. Now, in the event of a flood requiring the use of the floodway, the fuse plug levee would most likely crevasse just above Lucca Landing in the vicinity of Possum Fork. In moving down stream the crest of the flood will reach that point early, and this being the upper part of the fuse plug levee and the lowest point in the fuse plug section with reference to the 1914 grade, the flood would overtop the levee at that point earlier than it would overtop it at any other point. As shown on the map, this weak point at Lucca Landing is located downstream from the mouth of the Arkansas and White Rivers where the levees are wide apart. The water levels in that area will rise to a sufficient elevation to force the water through the gorge (bottle neck) between Catfish Point and Chicora Landing before the same elevation will be reached on the fuse plug levee below Arkansas City.

205 The operation of Boeuf Floodway as a diversion channel as designed by the Flood Control Act of May 15, 1928, will lower the gage heights along the river on both sides above the spillway, or outlet from the river. To be most effective for the relief of the levees South from Helena to the mouth of the Arkansas River the fuse plug levee should be blown above Arkansas City in the event of a flood. This would put more water on plaintiff's land than any flood has ever done prior to the adoption of this plan. The crevassing of the fuse plug levee would be so close to the plaintiff's land that it would receive the maximum effect of the diversion from the river.

When the fuse plug levee fails in the vicinity of Lucca Landing, where it is most probable to crevasse, as now authorized by the Flood Control plan of May 15, 1928, a flood of the type and volume of the 1927 flood would flow approxi-

mately 25 feet deep over the plaintiff's land. This is approximately 10 feet deeper than plaintiff's land was actually overflowed in 1927. The extra water which would now flow over plaintiff's land escaped into the State of Mississippi in 1927 through the Mounds Landing crevasse in that latitude. Also such water as did flow over plaintiff's land in 1927 escaped from the Arkansas River through the Pendleton and Medford crevasses. Now in the floodway the crevasse in the Mississippi River levee would be in closer proximity to plaintiff's land and more destructive.

The levees on the South bank of the Arkansas River as authorized and contemplated by the Flood Control Act of May 15, 1928, have been substantially completed for approximately five years. For the last five years and hereafter plaintiff's property is reasonably protected against any future floods from waters escaping from the South bank of the Arkansas River.

206 The effect of construction work done under the Flood Control Act of May 15, 1928, has subjected plaintiff's property to a different and increased flood hazard; to more depth of water and a greater velocity of flow on account of the close proximity of this property to the fuse plug levee. The volume of water increases rapidly with depth of flow and velocity. The increased velocity is very destructive to the property. This velocity over plaintiff's land in a flood the type and size of that of 1927 would now probably be 8 to 12 feet per second.

Under the present plan and conditions destructive flood waters will now pass over plaintiff's property by reason of diversion from the main channel of the Mississippi River at a gage of 60½ feet on the Arkansas City gage. It might occur at a less gage height, approximately 59 feet, because of winds, the current, swamps, and rain fall in the immediate vicinity. Wave wash is destructive to the life of levees of this type. Waves from the Northeast might run as high as 4 feet against the fuse plug levee at Chicora Landing.

"Free board" is the vertical height from the surface of the water to the top of the levee, and is to prevent the overtopping of the levee, affording relief against wave wash. The free board established in the adopted project by the Flood Control Act of May 15, 1928, is one foot. Five feet of free board should be provided. At a stage of the river of 60.5 on the fuse plug levee at Arkansas City it would have no free board.

The fuse plug levee cannot safely be overtopped at any depth whatever without a crevasse being reasonably certain. When a crevasse does occur the full height of the levee will probably wash away down to the ground surface, and considerably below the ground surface.

A flood 25% less than that of 1927 would now overtop and breach this fuse plug levee. This has been true for about three years.

207 The guide levees in Boeuf Floodway called for in the Flood Control plan of May 15, 1928, have not been constructed. They are in no way essential to the functioning of the plan so as to protect all of the alluvial valley of the Mississippi River except that portion actually in the floodway, as designed. The fuse plug levee is now in a condition to function whenever any flood occurs that reaches the point where the fuse plug levee is intended to function, viz., a gage of 60.5 on the Arkansas City gage. This has been true for approximately five years.

If the fuse plug levee were built to the 1928 grade and section, so as to make it equal in grade and section with the levee in the State of Mississippi opposite the fuse plug, and with the levees North and South of the fuse plug, it would place the entire valley in the middle section subject to levee failures at different points wherever the weakest levee should develop; which would entirely eliminate the diversion feature of the plan, and would destroy the plan.

Plaintiff's property is within the limits of the Boeuf Floodway, about 6 miles in a downstream direction from the point where the fuse plug levee will probably first fail. The map shows cleared land between this point of probable failure and plaintiff's property which will permit higher velocity to reach plaintiff's land than if the area intervening was heavily timbered. The building of the guide levees would in no way relieve the plaintiff's property from the flood menace under which it now rests.

Plaintiff's property has never before been overflowed by waters diverted from the main channel of the Mississippi River.

During former floods I have been present when the local people were making flood fights along this fuse plug levee. The Missouri Pacific Railroad has about 90 miles of main track in this immediate vicinity. During former floods  
208 the local property owners have exercised their rights to defend their property against floods from the Mis-

Mississippi River by building up the top of this levee with sacks of earth, bulwarks and such things. But for the Flood Control Act of May 15, 1928, holding this fuse plug levee at the 1914 grade, it would be possible in an emergency to so raise this fuse plug levee as much as 5 feet—2 feet higher than the levees now existing on the opposite bank of the Mississippi River.

The Medford and Pendleton crevasses on the Arkansas River in 1927 were about 4 miles apart, and 27 miles from the nearest crevasse to the plaintiff's land.

#### Cross-Examination.

Plaintiff's land was overflowed in 1912, 1913, 1916, and 1927. It would have been overflowed in 1929 if the Pendleton and Medford crevasse had not been repaired.

The Government has not committed any physical act to change the height or grade or strength of the fuse plug levee.

#### Re-Direct Examination.

The fuse plug levee has been subjected to additional stress, strain and loading with responsibility under the Flood Control Act of May 15, 1928. The relative strength of the fuse plug levee in comparison with the strength of the levees above and below the fuse plug, and on the opposite side of the river from the fuse plug, has been decreased to cause the levee to crevasse when the river reaches a stage of 60.5 feet on the Arkansas City gage.

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E. G. SPONENBARGER, on behalf of plaintiff, testified:

I am the husband of the plaintiff, Mrs. Julia C. Spokenbarger, and am her agent in the management of her property. The plaintiff owns the 40 acres of land involved in this law suit, described as SW $\frac{1}{4}$  of SW $\frac{1}{4}$  of Section 31, Township 12, South, Range 1, West. I have purchased the land for her, and now file for the record certified copies of her chain of title from the United States Government, which chain of title originates August 3, 1858, and ends with the Warranty Deed from George Hight and wife to Julia C. Spokenbarger, dated January 20, 1927, properly recorded in Desha County, Arkansas, conveying the land in question, reciting a cash consideration of \$3,500.00. The land is practically all in cultivation.

The plaintiff, and those under whom she holds title, have had the actual, open, continuous, notorious, peaceful, adverse



The plaintiff paid in cash for this land on January 10, 1927, \$100.00 per acre, which at that time represented a fair market value of the land. I have lived in Desha County for thirty years and am generally familiar with the development of Desha County and the marketing of lands around Arkansas City. I have bought various tracts of land, and am generally familiar with other sales in this area.

After the passage of the Flood Control Act of May 15, 1928, when it became generally known in the community that this 40 acres of land lay in the Boeuf Floodway, it lost its value on the market. After reasonable effort and diligence during the year 1929, I would say the fair market value of this land for which it could have been sold was \$10.00 or \$15.00 per acre. That represents the fair market value of similar lands in that locality, similarly located in this floodway. Measured by this difference of market value before and after the placing of this land in the Boeuf Floodway by the Flood Control Act of May 15, 1928, the damage sustained by this  
210 property was about 80% loss. With the improvements I had put on it this would be \$100.00 per acre.

There was no change in the fair market value of this land up until the time this suit was filed in August, 1934. Plaintiff has neither been offered nor paid any compensation by the Government, or anyone else, for the taking of this land for floodway purposes, nor for flowage rights thereover. The plaintiff has never been made a defendant in any condemnation suit by the Government to acquire flowage rights over this land. The plaintiff is a native citizen of the United States; has made no assignment or transfer of her claim for damages against the United States involved in this action; has at all times borne true faith and allegiance to the Government of the United States; has never in any way voluntarily aided or abetted or given encouragement or support to rebellion against the Government of the United States; and no Congressman is, or can be, in any way [benefitted] by plaintiff recovering in this action.

The reason why placing this property in the Boeuf Floodway by the Flood Control Act of May 15, 1928, has depreciated its market value is because the land is reserved to be used when the river passes a certain stage; the Act deprives the plaintiff of any right to protect her land and raise the levee; it takes her rights away from her; it destroys the market which she had at Arkansas City which before was a good town; it has ruined the school due to the fact of so many people leaving on account of the town being subject to this overflow; and there are so many reasons.

Plaintiff's property is fertile, like other land in that community, and will produce 350 to 500 pounds of lint cotton per acre. The land lies adjacent to a concrete inter-state highway, leading to Little Rock, the capitol city of the State, toward the North, and connecting with highways and a ferry leading into Louisiana and Mississippi. It was an inter-state road. Since the creation of Boeuf Floodway there is no ferry at Arkansas City.

The property is well drained both naturally and artificially. We bought the land for the purpose of building a home on it. I had the plans and specifications made. When we learned that the property was in a floodway created by the 1928 Act, that destroyed all our desire for a home out there.

Mrs. Sponenbarger and I were engaged in the drug business in Arkansas City at the time, only two miles from this land on the concrete highway, and near enough for us to have lived on the land and continued business in town. Since the creation of this floodway, so many people have left Arkansas City that it no longer constitutes a market for the products of this farm.

Taking into consideration the actual condition of this land, its fertility, its productiveness, its location, its drainage, its improvements, and all other features that actually existed, at the time this suit was filed the land would have had a fair market value of \$125.00 if it had not been in this floodway.

No past due taxes or assessments of any kind are due to the State of Arkansas, the Southeast Arkansas Levee District, the Cypress Creek Drainage District, or any other taxing authority.

The placing of this property in the Boeuf Floodway as the result of the passage of the Act of May 15, 1928, destroyed its loan value. Both the Federal Land Bank of St. Louis and the Federal Housing Administration declined my application for loans on property in this floodway.

#### Cross-Examination.

I have lived in Arkansas City since 1908. Besides operating a drug store, I am also a public ginner and farm. I own my own home in Arkansas City which I have substantially improved during the past winter.

The same flood situation exists in Arkansas City as exists at plaintiff's land until the authorized ring levee around Arkansas City is completed. Witness bought four adjoining lots to his property in Arkansas City recently, in 1937, to make

the yard larger for flowers. Spent a good deal of money the past winter in enlarging his house. He recently bought one hundred twenty acres of land just across the highway from the land in controversy. This was wild land and he had cleared it and put in cultivation, and built some houses on it. He had contracted for more land but had not closed the deal.

In 1933 I bought 120 acres of cutover timber land about one-half mile nearer Arkansas City than plaintiff's property for \$1 per acre. It will be protected by the ring levee around Arkansas City when it is built. The fertility and productivity of the soil is just as good as plaintiff's 40 acres. I have cleared it all up, built some houses off it, and put it in cultivation. This cutover woodland which I bought for \$1 an acre had a market value of \$10 or \$15 an acre before it was put in the floodway by the 1928 Act.

After buying her land at \$100 per acre on January 10, 1927, plaintiff put about \$25 per acre of buildings and improvements on the land. Thereafter the 1927 flood overflowed the land about 15 feet deep. That did not hurt the market value of the land. The price did not go down until the Government took possession of it for flowage rights, and said they were going to turn the water in on it when the river got to 60.5 on the gauge. We are still in possession of the land, farming it and making good crops on it. No one has interfered with our possession. The United States took the right to use it for flowage in 1928. When it became generally known that the land was in the floodway it was ruined from the standpoint of market value.

This land was overflowed in 1912, 1913, 1916 and 1917, but was worth \$100 per acre when I bought it in 1927. Only  
213 after it was put in the floodway was its market value taken away. The fertility of the soil has not been hurt.

I have borrowed money several times, and have included this land as security, but the loans were made to me on my personal statements, and my home, and my gin business, and not on any loan value of the plaintiff's property.

The price of cotton went down to 5c or 6c a pound in  
214 1930, but that had nothing to do with the low value of plaintiff's land because its value was already gone.

The land has not been flooded since 1927. We haven't had any flood fight. The Lord has been with us. The Government repaired the 1927 crevasses at Pendleton and Medford on the Arkansas River.

Neither the 1927 flood, nor any former floods decreased the market value of these lands in the vicinity of plaintiff's property. On the contrary, there had been a steady trend up of such market values in Desha County prior to the passage of the Flood Control Act of May 15, 1928. After the flood of 1916, market values were higher than they had ever been. After each flood the levee district board would fix the levee and tell us we would have protection. By 1927 the levee line from the mouth of the Arkansas River downstream was actually completed and actually protected us during the 1927 flood. The steady increase in market values notwithstanding former floods grew out of our assurance of flood protection. The Flood Control Act of 1928 put us in a floodway and destroyed this assurance which had given market values to our lands.

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E. E. Horson, on behalf of plaintiff, testified:

I have lived in Arkansas City, the county-seat of Desha County, Arkansas, since July 4, 1908, about 2 miles from plaintiff's property. I have practiced law in that county for 28 years; and have represented the banks, sawmills and land companies in the county since that time; have owned in excess of 1500 acres of farm lands, and in excess of 10,000 acres of cutover lands; and now own 3 farms in the county in the Boeuf Floodway. The banks which I have represented cover pretty closely all the business interests involved in the land which is now known as Boeuf Floodway. I have become personally familiar with market values and loan values in that area during that period of time, and by reason of my business of examining titles have been familiar with most of the land sales that have been made. I am familiar with the real estate records of the county, the assessment values, and economic development of the county.

Arkansas City had a population of about 3100 people in 1926. The population does not now exceed 1400 people.

Of the land area in Boeuf Floodway, about 20% is in actual cultivation and the remaining 80% is cutover land, which means that the timber has been cut and removed from it. All of the land is fertile and susceptible to cultivation.

When I went to Desha County as a young man there was a large gap in the Mississippi River levee line at the mouth of Cypress Creek. There were a number of well developed farming interests, mostly large farms that carried the title of plantation. A number of these large plantations were valuable and occasionally some of them sold, but ordinarily they



were owned by the same persons for years and were not on the market as often as farms of smaller size. Cutover land at that time had very small value. Beginning in 1912, the lands began to be sold and after 1913 values rose. By 1916 the Cypress Creek Drainage project was beginning and land values continued to rise very rapidly. By 1920 values were very high as compared with 8 to 10 years before. Cutover lands by that time had a ready saleable market at from \$18 to \$40 an acre; and farm lands were selling in excess of \$100 per acre. About 1922 there was a slight falling off in the market values of woodland and cutover lands, but farm lands in actual cultivation remained practically the same until after the creation of the Boeuf Floodway when there were no values.

By 1929, after the creation of the Boeuf Floodway, all loan agencies had withdrawn from making loans within the  
216 Boeuf Floodway, and no local bank would make any loan against any of the land within the vicinity of Arkansas City, and there were no land values.

When I first went to Desha County, all of the surface water south of the Arkansas River from Pine Bluff southeast emptied into the Mississippi River through Cypress Creek, leaving a gap in the levee lines along the river at that point. Before this gap in the levee could be closed it was necessary to provide other drainage for that water. Cypress Creek Drainage District was formed for this purpose in order that the gap in the levees could be closed. The gap was closed in 1921 by the Southeast Arkansas Levee District which was created for that purpose, by the Arkansas Legislature, at the request of the Mississippi River Commission made in 1916, under supervision of the United States Corps of Engineers. This levee line, which is now designated as the fuse plug levee, has never failed by being overtopped, crevassed or breached since 1921.

When the Cypress Creek Drainage District was created and the people knew that the gap in the levee at Cypress Creek was going to be closed, that is what brought about the increased market values.

The successive overflows of this territory by the Mississippi floods of 1912, 1913 and 1916 did not have any effect on the market values of land there because we were all looking forward to the closing of the levee gap, and bringing the levees up to sufficient grade to control the floodwaters of the Mississippi and Arkansas Rivers. The 1916 flood was the greatest flood we had ever had up to that time, but just two

years after that 1916 flood cutover land in that area was selling up to \$40 an acre and farm lands sold for more than \$100 an acre. These values prevailed, notwithstanding the fact we had just endured 3 major floods, on account of the fine, rich country, the productivity of the lands, and the belief  
 217 of the people that they had solved the flood problems, and were protected. After 1916, the next flood which overflowed these lands was that of 1927. The 1927 flood did not destroy nor depreciate market values any more than any of the preceding floods.

I am personally familiar with the plaintiff's 40 acres of land and its market value. Small tracts of land usually sell for more per acre than large tracts. Practically all of plaintiff's land is in cultivation. It is located on State highway within 2 miles of Arkansas City, which, at the time of plaintiff's purchase, was a thriving, progressive town with sawmills, banks, gravel companies, and logging operations. The land is very fertile and offered every inducement to a small property owner as a desirable home. The fair market value of plaintiff's 40 acres immediately prior to the passage of the Flood Control Act of May 15, 1928, was from \$100 to \$125 per acre. When it became generally known that it was in the bed of the Boeuf Floodway created by the Flood Control Act of May 15, 1928, it had no market value.

Immediately following the final order of the President on January 10, 1929, approving the Boeuf Floodway, the order was published in the State newspapers, but was given greatest publicity as to the intention of the United States when Major Lee from the District Office of the United States Corps of Engineers at Vicksburg came into the territory and at public meetings of the people explained the purpose of the Boeuf Floodway and the provisions of the Flood Control Act of May 15, 1928. Then it was that market values were destroyed.

If the plaintiff's land had equal flood protection with other protected areas of the alluvial valley of the Mississippi River not in the Boeuf Floodway it would have had a fair market value at the time this suit was filed in October,  
 218 1934, of \$100 per acre. The Flood Control Act of May 15, 1928, placed plaintiff's property in this floodway with the specific provision that the fuse plug levee should not be raised or strengthened above the 1914 grade and section and that the levees above on the Arkansas River and on the east bank of the Mississippi River should be raised and strengthened, thus making it definite and certain that these lands in the floodway would be overflowed, and

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that the crevasse would be brought into closer proximity of plaintiff's land, thereby subjecting it to greater velocity of water, more soil erosion or greater deposits of sand, thus completely destroying the desire of any person to own any such land.

The plaintiff's property right of defense has been taken away by the plans and specifications adopted by the Flood Control Act of May 15, 1928. Theretofore during a flood fight every available man in the vicinity would participate in a fight exercising the right of the property owners to defend their property by building up the levee. I have seen water carried by sacking the levee 5 feet higher than the levee crown. That was true in all levee fights, especially during the 1927 high water fight when many miles of the levee were thus actually raised so as to safely carry the water past the fuse plug levee at a gauge of 60.5 feet until the river receded and the pressure on the levee line was relieved by the crevasse at Mounds Landing on the opposite side of the river.

I know that no real estate or farm loan would be made by local banks on property in the floodway. In some cases, particularly in the case of Mr. Sponenbarger's loans, such land would be included as security but there was always other collateral to secure the loan. Farmers are borrowers of money and if their land is not good for collateral it depreciates the market value of the land.

219. No person would undertake to build a home in the path of the Boeuf Floodway. This has the effect of destroying or taking away from the market value of that land. (Rec. 440.)

Prior to the Flood Control Act of May 15, 1928, extensive plans for developing this area, by selling land to the investing public and farming people who were looking for homes, were made by the Missouri Pacific Railroad Company by extensive advertisement. That development was entirely abandoned when this property was placed in the floodway because you can not sell land in the floodway. I was personally interested in a number of other such proposed developments in that area, but all such development plans were abandoned after the 1928 Act because we thought that the market value of lands in the floodway had been completely destroyed in so far as being worthwhile as a place for people to build homes and live.

After the creation of the floodway by the 1928 Act fire insurance policies on property in the vicinity of plaintiff's



land were cancelled or reduced to a negligible amount, tending further to the destruction of market values.

By the destruction of industries at Arkansas City as the result of the Boeuf Floodway, it destroyed Arkansas City as a market place to which plaintiff's property was accessible. The lumber industries, which afforded employment to a large number of people, were completely paralyzed after it was learned that Arkansas City would not have adequate flood protection. The schools were reduced from a high standard to one of the lowest grades in the State. This has had a marked effect on market values in the vicinity of plaintiff's property.

After the creation of the Boeuf Floodway, the Arkansas-Louisiana Highway along plaintiff's property was eliminated from Federal aid, and the road has fallen into a very decayed condition, directly affecting the market value of plaintiff's property. Since the placing of this property in the floodway, all plans for draining land from an agricultural standpoint in that vicinity have been completely abandoned. There are not sufficient land values left to support bond issues.

The market value of cutover lands in the Boeuf Floodway has been destroyed because such lands can not now be sold after being put in cultivation for the actual cost of putting such lands in cultivation. This has affected the market value of plaintiff's property.

The floodway has increased the tax burden on plaintiff's property, thus affecting its market value, because such a large amount of land has been allowed to forfeit for the non-payment of taxes, and that which remains on the tax books is there at such a low value that no tax income is received from them, thus practically wrecking the county in the matter of building bridges, taking care of dirt roads, providing health nurses, county agents and home demonstration agents, which county functions are now left to the gratuitous donations of the farmers.

The general national economic depression began in 1920. No part of the loss of plaintiffs' market value can be attributed to that general depression because plaintiff's land had lost its market value prior to that time. No part of her loss of approximately \$100 an acre can be attributed to that depression. It had already been lost. At the present time, when the depression is passing and the Department of Agriculture reports a return in general agricultural values over the country as a whole to 82% of pre-war level, no part of

the market value has been restored to plaintiff's land in this floodway.

No part of the plaintiff's loss of market value can be attributed to the bonded indebtedness or taxes and assessments against her land. There has been no change in the tax burden since the plaintiff bought her land in 1927. The  
221 market value of plaintiff's land in 1927 existed notwithstanding the tax burden in which there has been no change except to lower assessments.

The market value of land in the floodway like plaintiff's has also been affected because there is not as good a class of tenants within this floodway as we had before. A great many of the enterprising tenants who own their own live stock have moved to communities where more protection is offered.

There has been some increase in the population in Desha County, mostly outside of the Boeuf Floodway, by large numbers of people who are donating from the State of Arkansas these lands which have been forfeited for nonpayment of taxes. I think this can be done at a cost not in excess of \$10 per 40 acres. A portion of such donators are on the public relief rolls, supported by various Government agencies that offer aid to destitute people. This tends to lower the level of all land values, and such an increase in population has not increased the market value of the plaintiff's property.

I am familiar with the present ownership and purchases of property immediately surrounding the plaintiff's 40 acres. I pass that property twice each day in going to and fro from my home in Arkansas City to my business office in McGehee. In 1933 or 1934 A. P. Price purchased the 160 acres of land joining the Sponenbarger 40 on the South side for \$1.00 an acre. He bought the adjoining 80 acres in the woods for \$1.00 per acre. These were not forced sales, but were free and voluntary purchases on the open market, representing similar purchases that could be made in the floodway generally in that vicinity from the fuse plug levee on down. \$1.00 per acre was the fair market value of that property in the floodway. If this property were not in the floodway it would have a fair market value of \$65.00 or \$70.00 per acre.

There has been no change in these market values since  
222 January 10, 1929.

Immediately East of this Price land in the Section adjoining the plaintiff's property, E. G. Sponenbarger purchased land for \$1.00 an acre. In the Section one mile West of plaintiff's property C. C. Hawkins and DeWitt Poe

bought land for \$1.50 an acre. In Sections 17 and 20 about 2 miles Northeast of plaintiff's property, land the greater portion of which was in cultivation has sold for as low as \$1.00 per acre since 1930. These cutover lands which have sold for \$1.00 per acre would have a market value of from \$15.00 to \$20.00 an acre, and the cleared land would have been worth \$100.00 an acre if they had not been in Boeuf Floodway, or had enjoyed flood protection equal to that of other parts of the alluvial valley. There has been no substantial change in these market values in the vicinity of plaintiff's property since their first loss of value about January 10, 1929.

The Federal Land Bank of St. Louis loaned \$9,153.00 on 120 acres of land about a mile Northeast of plaintiffs' property before the Flood Control Act of May 15, 1928. After the passage of the 1928 Act they foreclosed their mortgage and later sold the property on the open market. In February, 1934, the purchaser from the Federal Land Bank sold a half interest in this land for \$140.00.

Since January 10, 1929, until the filing of this suit in August, 1934, cleared land like that of plaintiff's in this action, in the floodway, has had a market value of from \$10.00 to \$20.00 an acre.

Plaintiff's property has not been overflowed since the passage of the 1928 Act. We have had no threatening floods since 1929. The rain fall over the entire country has been exceedingly low.

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### Cross-Examination.

Witness was attorney for Desha Bank & Trust Company and the Bank of Commerce which failed some time in July or August, 1927, at Arkansas City. The flood of 1927 was the most destructive flood that had ever occurred in that county. The Bank of Commerce was located at McGehee. The Desha Bank & Trust Company failed some time in 1927, after the flood or high water. The Bank of Watson also failed in 1927. The Bank of McGehee failed but afterwards paid its depositors 100 cents on the dollar. Witness was also attorney for the Thane Lumber Company, located at Arkansas City. It failed some time during 1928, about the spring. There were a number of contributing causes to the failure of the Thane Lumber Company. They lost \$250,000 in the flood of 1927, which at least was a very contributing cause to its failure.

There were floods in that county in 1912, 1913, 1916 and 1927. Doesn't think that there was any flood between 1916

and 1927. Since the Cypress Creek Gap was closed in 1921 it (fuse plug line) has never been overtopped. It possibly would have been overtopped in 1927 if the Pendleton and Medford breaks had not occurred.

In the flood of 1927 the overflow water in Arkansas City stood at a depth from 16 to 20 feet. The waters were up to the tops of the buildings. It was a like depth on the Sponenbarger property.

Witness identified photographs of Arkansas City taken during the flood of 1927, which were introduced and admitted in evidence as Exhibits 29, 30, 31, 32 and 33. The Sponenbarger land is within two miles of Arkansas City and a picture taken of the Sponenbarger land at that time would have shown it in the same condition as was shown existed at Arkansas City. Witness lives in Arkansas City but practices law at McGehee and maintains his home at Arkansas City, and has continued to buy lands. Witness was shown photographs taken of part of the Sponenbarger land, showing the main residence. These pictures were offered and received as

Exhibits 34, 36 and 37. These buildings were all washed  
224 away and across the road and it is witness' recollection that 150 houses or more were piled up right there in the vicinity of the Sponenbarger land during the flood of 1927. Witness had about 10,000 acres of land which was in his son's name. He bought this land in the fall of 1928 or spring of 1929. Witness had filed a suit against the Government for taking this land. It was filed in the name of his son. He was seeking to recover \$100.00 an acre for the cleared land and \$10.00 an acre for the non-cleared land. This suit totaled a prayer for judgment in the aggregate amount of \$64,000. Witness did not consider the total consideration paid for the 5,000 acres of land that was in his son's name to exceed \$4,000. He was asking judgment against the Government for \$50,000. He is also interested as an attorney on a contingent basis in a large number of other lawsuits filed against the Government. These suits in which he is interested as attorney aggregate something like a million dollars or more. He does not have an interest in the suit filed by the Missouri Pacific Railroad Company for thirty-four million dollars. After the flood of 1927 the advertisements that they had been putting out to induce settlers and home-seekers to move into that vicinity were discontinued. Approximately 85% of the land down there is uncleared land. The Sponenbarger land and a majority of the other land in the floodway was somewhat burdened with Special Improvement District Taxes. There were 79,771 acres of land deeded to the Southeast Arkansas Levee District in that county in



1924, under decree of foreclosure. During the years of 1925 and 1926 there were 102,000 acres and 79,000 acres that went delinquent for taxes.

225 There was not any general decline in land values after the flood of 1927. There is a period of time after each flood in which you find a stagnation in sales, but the values remain the same. Land values in this area did not decline in 1927 before the passage of the Flood Control Act of May 15, 1928. Land values generally started down in 1930 which affected lands outside this floodway. Land values in the floodway were destroyed before 1930.

I recognize the picture of Arkansas City which you show me inundated during the 1927 flood within 2 miles of the plaintiff's land. Plaintiff's property was overflowed in the same way by the same flood.

It is not true that the same thing happened to the value of lands in the Boeuf Floodway that happened to the country generally in the alluvial valley in Arkansas in that distress conditions generally beginning back in 1929 or 1930 became more acute and destructive all the time until within the last year or two. Our lands in Boeuf Floodway lost their value before 1929 or 1930. I know of no other land in the State of Arkansas on which the United States Government has reserved the right to discharge over it 900,000 cubic feet per second of water.

A great deal of land in this area in the floodway has been sold for \$1.00 an acre. I have bought some lands in this area but have filed no claim for damages against the Government on such recently acquired lands. I think such claims are now barred by the statute of limitation.

#### Redirect Examination.

In former floods such as those of 1912, 1913, 1916 and 1927, when Arkansas City and the plaintiff's property were inundated, the water came from distant crevasses and rose very gradually with no destructive current. Often when the water subsided it left deposits on the land, not in close  
226 proximity to the break in the levee, which were beneficial. Nor were crops lost except in 1927.

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JOHN BAXTER, on behalf of plaintiff, testified:

I live in Dermott, Chicot County, Arkansas, about 18 miles by hard surface road from Arkansas City. Have practiced law for 20 years. Have filed no suits against the Government for any of my clients under the Flood Control Act of May 15,

1928. I am President of a bank in Dermott and am a Director of a wholesale grocery company which for 15 or more years has operated throughout this entire territory. I am President of the Delta Production Credit Association, a semi-governmental relief agency that makes crop production loans in Desha and Chicot Counties. I assisted in the liquidation of the Desha County banks which closed in 1927 and have traveled over the entire area involved in this litigation for a number of years. For about 3 years I was liquidating mortgages held by the insolvent Desha County banks. I have been familiar with real estate values throughout that area since prior to 1927. I have known the plaintiff's property for probably 15 years.

Immediately prior to the creation of the Boeuf Floodway as a result of the Flood Control Act of May 15, 1928, plaintiff's property was easily worth from \$100.00 to \$125.00 an acre. Immediately after it became generally known that it was in the Boeuf Floodway its market value did not exceed \$25.00 an acre. Plaintiff's property has been damaged to the extent of \$75.00 per acre solely by reason of it being placed in the Boeuf Floodway by the Flood Control Act of May 15, 1928. There was no change in its market value after being placed in the Boeuf Floodway up until the filing of this suit in August, 1934.

227 The market value of plaintiff's property was destroyed prior to the general economic depression beginning in 1930. Exceedingly good crops have been grown in Desha County on all land for the last two or three years which has slightly restored market values.

The tax burden on plaintiff's 40 acres of land is not more than \$40.00 a year. A dollar an acre on this land would not affect its value at all because that [it] low taxation. Lands in production can carry the burden easily. The market value of plaintiff's property to which I have testified existed in spite of its tax burden. No indebtedness whatsoever has been added to it since it was put in the floodway. The annual tax burden has recently been lessened in Cypress Creek Drainage District by a refunding program. The loss in market value of plaintiff's property occurred on account of the passage of the Flood Control Act of May 15, 1928, adopting what we call the Jadwin Plan.

Prior to the 1927 flood the property owners of this area had been hoping to eventually have perfect flood control. After the 1927 flood the public press finally carried the news of the adoption by Congress of the Jadwin Plan. Repre-

representatives of the Government later addressed public meetings assembled in the area and explained the engineering plan adopted by the Flood Control Act of May 15, 1928. When this information became generally known nobody wanted to buy lands in the Boeuf Floodway, and the market value was destroyed. There was no substantial change in that condition prior to the filing of plaintiff's suit in August, 1934.

As a banker I know that loan values in the floodway were destroyed. I went to St. Louis to find out what the trouble was and was told that we were in the floodway. Property owners who sought loans on property in the floodway were turned down. The Delta Production Credit Association, of which I am President, just makes annual loans for each year's crop. We will not pledge ourselves to make a loan next year on property in the floodway in the vicinity of the plaintiff's land. We make no loans in that area any year until all danger of flood has passed.

For the last five or six years there has not been sufficient rain fall to give any alarm to the lower Mississippi valley except in 1937, and at that time the Arkansas and White Rivers were very low and so we knew there wasn't any danger of a flood in our section. Had there been a repetition of the 1927 flood, or had there been ordinary flood stages in the White and Arkansas Rivers when the crest of the Ohio flood came down the valley in 1937, undoubtedly the fuse plug levee would have blown out.

The type of population that has gone into that area since the floodway was created are people from the hills who have come to this bottom country and cleared up lands and built homes at no cost to themselves. They have paid nothing for the land and have been out no taxes. They are commonly called "donators" or "squatters". Some of these folks have purchased that land for \$1.00 an acre from the original owner, or the State, or somebody else. Such wild lands were worth \$25.00 per acre prior to the 1928 Act, and cultivated lands were worth from \$50.00 to \$150.00 an acre depending upon location, proximity to schools, roads, churches, towns and other things of that description.

It is the definite policy of my bank, and the other banks in Southeast Arkansas, that we will not make loans on the credit of land in Boeuf Floodway unless the applicant is financially responsible, regardless of that security.

## Cross-Examination.

I was connected with the Bank of Dermott from 1920 to 1929 when it consolidated with the other bank in the town. I have been connected with the Dermott State Bank, as its President, from its organization to the present time. I was attorney for the liquidating agent of 5 banks in Desha County, 3 of which were in the Boeuf Floodway. Neither myself, nor any of my clients are interested directly or indirectly with any of the litigation filed against the United States in the Court of Claims.

The value of lands is affected by the rise and fall of the various commodities which the land produces, especially cotton. Back in 1918-1920, in the war period, lands went very high. About 1923 things got back to normal and rocked along with about the same prices, with gradual and slight increase in this territory, until the passage of the Flood Control Act when it became known that these lands were in the floodway and the price went down. In 1919, the price of cotton was 60c a pound, the highest it has ever been.

There are no lands in adjoining counties in Arkansas comparable to the lands in this floodway. The only land we can compare, are the lands just across the river. The land in the floodway is better. The land across the river, comparable to this land in Boeuf Floodway, suffered depreciation in market value to some extent during the depression, but they have climbed back to normal and are probably of a market value of \$100 to \$125 per acre. Those lands not in the floodway, across the river, were at their peak of market value until the Fall of 1930. Then they went down to a certain extent because cotton went down. The general depression  
230 affected land that was beyond the Boeuf Floodway in other territory, but the price of lands in the floodway had been destroyed before the depression came, and therefore there was nothing left for the depression to destroy in the floodway.

The land in the floodway is just as productive as it ever was. We raised more cotton in 1936, then ever before. The land in the vicinity of plaintiff's land averaged three-fourths of a bale or a bale an acre. Cotton sold for approximately \$70 to \$75 per bale. Last year I expect the gross income of land in cotton and corn would be from \$30 to \$50 per acre, or a net of \$8 to \$10 per acre.

In 1929 cotton was worth 20c to 25c a pound. Land in the floodway had a reasonably relative value until it became known that the passage of this 1928 Act had taken that



ritory into the floodway. It lost 75% of its value in 1929, and early in 1930. In December, 1930, cotton went down to 10c a pound and about 1932, the lowest we have ever had, was about 5c.

W. E. THOMPSON, a witness for plaintiff, testified:

I have lived in Desha County, Arkansas, 25 years, being cashier of the Desha Bank & Trust Company in Arkansas City for 14 years, and cashier of the McGehee Bank since then. I am familiar with market values of lands in the Boeuf Floodway in Desha County. A very large number of sales of land in that area have passed through my hands. I know the plaintiff's 40 acres of land involved in this suit.

Before plaintiff's land was placed on the floor of the Boeuf Floodway by the Flood Control Act of May 15, 1928, it was worth about \$100 an acre. It was actually sold for that. That was the fair market value at that time of other lands already in cultivation in that general vicinity. After it became generally known in 1928, that it had been embodied as a part of the Boeuf Floodway under the Flood Control Act of May 15, 1928, I would say that the fair market value of plaintiff's land was less than \$25 an acre. We sold the place adjoining it, a similar tract of land, for less money. The land on the west side of plaintiff's land was sold in the open market to C. C. Hawkins, who owned an adjoining farm, for \$15 [and] acre.

Putting plaintiff's land in the Boeuf Floodway reduced its loan value to a very small amount, if any. My bank loaned Mr. Sponenbarger money every year, but we did not look to the land alone as security. We would not lend any substantial amount of money on farm lands in the floodway unless to a man to whom we would very likely lend without any security. We made the Sponenbarger loans on Mr. Sponenbarger's ability to pay, and not on the land. That would be true of any other instance that might be found in the floodway where the land happened to be included in a mortgage to our bank.

#### Cross-Examination.

The Desha Bank & Trust Company failed in 1927, before the passage of the 1928 Act. (Rec. 594.)

We had flood water in Arkansas City in 1912, 1913, 1916, 1920 and 1927. There have been no floods in this country since 1927. The Government rebuilt the Arkansas River levee down to about Yancopin and has built a new set-back levee from Arkansas City 8 or 9 miles north.

The plaintiff has cultivated her land every year since the passage of the Flood Control Act. I have no interest in any of the suits filed against the United States. I do not own a foot of land in the floodway.

No man would want to make a home on land in the floodway, nor make any permanent improvement. The land may be flooded any time the Government likes and the stage of water justifies, and this constant threat of floods and serious damage to the improvements, and even to the soil itself, would keep the land from going very high in market value.

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JUDGE J. L. PARKER, on behalf of plaintiff, testified:

I have lived in Arkansas City 32 years, and was judge of Desha County Court for several years. I have been in the banking, mercantile and farming business. I own De Soto plantation, about 6,000 acres, beginning about 5 miles north of Arkansas City. About 3½ miles of the north end of the new set-back part of the fuse plug levee runs directly through my plantation. As a banker I have been interested in the real estate values in that section. I was a member of the board of the Southeast Arkansas Levee District for a number of years. I am thoroughly familiar with the levee protection of that area, and with agricultural values.

Prior to 1921, during high water, water from the Mississippi River would flow through the levee gap at the mouth of Cypress Creek and inundate lands in that vicinity. These waters would reach the vicinity of plaintiff's land gently and gradually, not coming with a rush. They left a deposit of soil on the lands that was really beneficial to it, and did not wash away fences or destroy the houses or hurt the soil, and we did not lose crops from overflows. In fact through the ages past this territory of fertile Mississippi valley alluvial soil was built up by deposits from flood waters coming over these lands for thousands of years. After the outlet at the mouth of Cypress Creek was closed we had no further overflows prior to the disaster of 1927, which came down to us from the Arkansas River. The fuse plug levee was not overtopped or crevassed by the 1927 flood. The water began to recede when the levee broke in the State of Mississippi opposite Arkansas City.

None of these floods prior to the passage of the Flood Control Act of May 15, 1928, materially impaired the market value of lands in that vicinity. Woodland had reached a market value of from \$25 to \$40 per acre,

and cultivated lands had been sold from \$80 to \$125 per acre. The land was fertile and market values were constantly rising notwithstanding the overflows mentioned because we were constantly building levees and the engineers kept telling us that eventually we would get protection that would absolutely keep these waters off our lands. We knew we had the finest lands in the world. The final step for the protection of our land from the Mississippi River overflow waters was closing the Cypress Creek in the levee line.

We created the Cypress Creek Drainage District and bonded our lands for \$3,500,000 to divert the Cypress Creek water which was going through the levee gap into the Mississippi River and then closed the gap. We thought the closing of that gap would hold the overflows from us.

I have been personally familiar with plaintiff's 40 acres of land for 32 years. It is deep, alluvial soil; none better in the valley anywhere. It was located on an interstate, improved highway, accessible to Arkansas City for schools and trucking market. The location made it extremely valuable. Before the passage of the Flood Control Act of May 15, 1928, a fair market value of the plaintiff's land was \$100 an acre. She paid that for her land in cash. That was a fair market value of similar lands in that vicinity for several years. After purchasing her land the plaintiff built houses and fences on the land and improved it.

After the passage of the Flood Control Act of May 15, 1928, information of its effect was disseminated by Government officers in public meetings of property owners late in the summer of 1928. Then we just forever gave up hope. After it became generally known that plaintiff's land was in the Boeuf Floodway it had no value. Today she might get \$25 or \$30 an acre for the property. I would say that 234 the market value of plaintiff's land when she filed her suit in August, 1934, was \$25 an acre. It has not exceeded that value since the passage of the Flood Control Act of May 15, 1928.

In 1929 the country generally was enjoying a wave of prosperity. Cotton was 18c a pound. 1929 is commonly referred to as the boom year, but values in the Boeuf Floodway were at a very low ebb in 1929. I bought the De Soto plantation, 6,000 acres, about 5 miles north of Arkansas City, in the floodway, in the Fall of 1929. I paid \$5,000 for this 6,000 acres, about 85c an acre. It had no value because it was located in this floodway. Before this plantation was put into the Boeuf Floodway by the Flood Control Act of May 15, 1928, it had a fair market value of \$150,000.

My lands are right at Possum Fork in the vicinity of Lucca Landing on the Mississippi River. That point of the levee has always given a lot of trouble. The levee is built right across the bed of that creek, Possum Fork, where the soil is sandy. The seepage is heavy and we have had several slides at the Possum Fork levee.

In October, 1936, I sold a section and a half of my land to Mr. Kemp for \$4.50 an acre. It is very fine land and had a market value of \$40 an acre before it was put in the Boeuf Floodway.

Three years ago the Resettlement Administration of the United States Government inspected my property with a view of buying it. They were carried away with the fertility of the soil and were interested in the property until they went to the Vicksburg office of the Army Engineers and learned that the property was in the floodway. That absolutely killed the sale. They were no longer interested in it because it was in the Boeuf Floodway.

#### Cross-Examination.

When I bought the De Soto plantation approximately 235 600 acres was in cultivation and 5,400 acres was cut-over woodland. It carried a fixed assessment for levee and drainage taxes of 90c an acre in addition to the State and County taxes, except 1,500 or 2,000 acres of the land which lies east (river side), of the levee which carries a tax of 10c or 15c an acre.

I signed a statement which you show me dated February 20, 1935 prepared by Judge Kirten, an attorney for the Government, but do not remember reading the statement. In answer to the question, "What effect did the 1927 flood have on the saleable value of the (Sponenbarger) land?" the statement recites the answer: "We have had floods before, and they did not do so much damage, but the 1927 flood was extreme. . . . The flood destroyed the value of the land." And in answer to the question: "What effect did the flood waters of 1927 have on this (Sponenbarger) place?" the statement recites: "It destroyed the value of it. The flood destroyed the value."

I do not remember the statements I made to Mr. Kirten at the time, and did not read the paper. Mrs. Sponenbarger's land before the flood was worth \$100 an acre and I meant after the Flood Control Bill it had been destroyed.

I sold the United States 420 acres of my land for right of way for the set-back levee through my property. They paid



me \$50 an acre for the 114 acres of cleared land in the levee right of way, and \$20 an acre for the 314 acres of woodland. The Tensas Basin Levee Board of Louisiana bought this land last year for the Southeast Arkansas Levee District.

### Redirect Examination.

When I signed that statement in 1935, for Judge Kirten, the outstanding thing in my mind, and in the minds of all the property owners down there, was what had happened to that vicinity. The spillway has been in our minds ever since they passed the Bill. We are in the floodway down there and our property has gone to nothing. You get three men together and they will be talking about the spillway  
236 down there. That floodway down there has destroyed not only the values of the Spokenbarger land, but it has destroyed the values of all the land down there.

I tried to get all I could for the right of way for the setback levee. I knew the property was worth a whole lot more money and figured they had to pay me to compensate me for part of the loss that I had received on that property from the spillway. They paid me about half the value the property had before it was put in the spillway.

The 1927 flood washed the fences and houses away on the Spokenbarger land, but did no physical damage to the land itself. It did not damage the fertility or productivity of the soil, and did not damage the market value of the property a particle prior to the time it was put in the floodway.

This is strictly a cotton country, and cotton fixes the value of farming land in this area. Take out the cotton, Negroes and mules and you haven't anything left.

The general economic depression that began in 1930 did not account for any of the loss of the market value of the plaintiff's property. She did not have anything to lose. She had already lost everything she had. You can't kill a dead dog. The market value of her property had already been ruined. There is something radically wrong when these fine lands are selling from six bits to a dollar an acre.

We have had the same tax burden on these lands for years while the market values have been increasing. No bonds have been issued in the territory since 1927. The plaintiff has paid her taxes all along up to date. Notwithstanding the tax burden, the cleared land in this area, had an actual market value of from \$100 to \$125 per acre just before it was put in the floodway.

It costs from \$40 to \$50 an acre to put this cutover land into actual cultivation.

237 The damage caused by the passage of the Flood Control Act of 1928 is to some extent the damage of fear of what may happen in the future. There has been no physical damage as yet growing out of the operation of this project. It has destroyed our hope. Now we cannot have, or hope to have, our levee at the same strength or height they have on the other side of the river, and above and below us. It is the uncertainty of the thing. They could hold a gun on you and it wouldn't hurt you if it didn't go off, but you would not be comfortable. The same proposition applies to this floodway. It is loaded and is liable to go off, and it is not a comfortable feeling to live in that floodway.

Since this property has been put in the floodway I have not been able to borrow a ten cent piece on that land.

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238 J. L. FLOWERS, on behalf of plaintiff, testified:

I am 70 years old and have lived in Texas for the last 29 years. I never lived in the State of Arkansas.

I bought a section and a half of cutover timber land in 1918, in Desha County, Arkansas, about 6 miles southwest of plaintiff's land, in what has now become the Boeuf Floodway. I bought the land from Jackson and Vreeland, land agents who were selling lands in that community. Quite a large part of that area was being offered on the market when I selected the land which I bought. I am a stock farmer, and the land I bought was susceptible of being put into cultivation. I still own that land. Since owning it I have paid \$13,800 on it in taxes. (Over the objection and exceptions of plaintiff, the Court refused to permit the witness to testify that he paid \$40 an acre for the land).

Over the objection and exceptions of plaintiff, the Court refused to permit this witness to testify that his land had had no market value whatever since it became generally known that it was in the Boeuf Floodway.

#### Cross Examination.

I have filed suit against the Government for \$17,640.

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HOWARD L. CLAYTON, on behalf of plaintiff, testified:

I am the Sheriff and Tax Collector, of Desha County, Arkansas, where I have lived all of my life, 36 years. I have

been in actual charge of handling tax collections and records thereof since 1922, and am generally familiar with land values in Desha County. I have personally known the plaintiff's land involved in this suit since 1923. I own similar land in that vicinity.

239 Immediately prior to the time it became generally known that plaintiff's land had been placed in the Boeuf Floodway as a result of the Flood Control Act of May 15, 1928, the fair market value on plaintiff's land was \$100 to \$125 an acre. Immediately after it became generally known that it was placed in the floodway, plaintiff's land had practically no value. That was true of all the land of that type and character in that immediate vicinity in the Boeuf Floodway.

About 2 years ago I bought 480 acres of cutover timber land of the same general type, character, fertility, productivity, and general location as the plaintiff's land, just one-fourth of a mile away. I have put 300 acres of this land into cultivation, costing \$30 to \$40 an acre. The fair market value of that type of land in that locality immediately prior to the passage of the Flood Control Act of May 15, 1928, improved cultivated land like the plaintiff's land, was from \$100 to \$125 an acre. Since it became generally known that it was in the floodway it had practically no market value; which condition continues to this date.

Over the objection and exceptions of plaintiff, the Court refused to permit the witness to testify that after the creation of the Boeuf Floodway he was unable to collect taxes on property in the floodway because the owners had been deprived of flood protection.

#### Cross-Examination.

I reckon I was gambling by spending \$35 or \$40 an acre putting this land which I purchased into a state of cultivation, but I made a bale of cotton to the acre last year in the stumps. It will take from 4 or 5 years to get the stumps out of it.

I have filed no suit against the Government.

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A. C. ZELLNER, on behalf of plaintiff, testified:

I have lived in Desha County Arkansas since 1922. I own about 4500 acres of land in the Boeuf Floodway about  
 240 12 miles above Arkansas City, and about 12 miles below Yancopin. All of my land is in cultivation. I am a member of the Southeast Arkansas Levee District Board.

I have known the plaintiff's land since 1922. In productivity, fertility, drainage, and elements that enter into farming values, and values for agricultural purposes, the plaintiff's land is practically the same as mine. Immediately prior to the time it became generally known that plaintiff's land had been put in the Boeuf Floodway as created by the Flood Control Act of May 15, 1928, the fair market value of her property ran between \$100 and \$125 an acre, maybe a little better than that. That represents a fair market value of cultivated land of that type in the vicinity at that time. After it became generally known that plaintiff's 40 acres of land was in the Boeuf Floodway you might say it had no value. Some man might come along and buy it and operate it and get a crop off of it. That condition of market value in that immediate vicinity has continued up until the present time.

When I acquired my interest in my land in 1922, it was subject to a mortgage indebtedness of \$25,000. At that time practically 300 acres of the land was in cultivation and the balance was cutover timber land. The mortgage debt ran around \$50 [and] acre for the open land and \$20 an acre for the cutover land. I paid off the mortgage debt in 1925. Since the passage of the Flood Control Act of May 15, 1928, neither my land, nor any land in the floodway in the vicinity of the plaintiff's land, has had any loan value on which money can be borrowed.

#### Cross-Examination.

241 I do not think the flood of 1927 had any effect on the market value of these lands. Cheap cotton, high taxes, bonded indebtedness, mortgage indebtedness, depression, and general trouble has been on the land before and did not affect it up until the time it was put in the floodway, so I don't see why they could materially affect the market value then. I went through the very destructive 1927 flood, but have not been in that community before. The 1927 flood damaged improvements and personal property but was not injurious or damaging to the land. We didn't make any cotton crop that year because the water lasted until August. The 1927 flood didn't affect the market value of the land so far as permanent impairment.

242 TURNER NEAL, on behalf of plaintiff, testified:

I have lived in Desha County, Arkansas, 24 years. I have recently become a member of the Board of Directors of the Southeast Arkansas Levee District. My business has always been farming and stock raising. Since 1912 I have



owned 160 acres of land about 4 miles Northwest of the plaintiff's property, all in cultivation. In 1934 I bought another place North of Arkansas City, against the fuse plug levee, of which about 400 acres are in cultivation. Before I purchased any property in Desha County it was generally understood that the Cypress Creek Levee gap would be closed and that country would be protected from flood.

I have been familiar with plaintiff's 40 acres of land for 24 years. Immediately prior to the passage of the Flood Control Act of May 15, 1928, the fair market value of plaintiff's land was \$100.00 to \$125.00 an acre. As soon as it became generally known in that community that it was in the Boeuf Floodway as created by that Act of May 15, 1928, plaintiff's land has had very little market value. It might have had some market value for growing timber and grazing purposes, but it had very little for agricultural purposes. There has been very little material change in the market value of any agricultural land in the floodway in the vicinity of plaintiff's land since the floodway became known in 1928. General information about the floodway was circulated in the newspapers and through agents of the Government visiting in that country who explained it.

No part of plaintiff's loss of market value can be fairly attributed to the economic depression which began in 1930 because it was generally known that plaintiff's property was in the floodway and it had lost its value before the depression came.

243 The former floods which had overflowed plaintiff's property had not permanently affected the market value of her land.

The total acreage of my lands North of Arkansas City is 1,057 acres. It has all now been thrown outside of the recently built set-back levee, placed in the river, which has destroyed all of its value. I do not now expect to put any more of that land in cultivation.

#### Cross-Examination.

Former floods caused a visible loss in the way of fences and houses and things like that, but did not disturb the value of the land. The whole floodway depends largely upon the protection of the levee. When I first moved there plans were already under way to close the levee gap. We had reason to expect some water until the levee system had been completed and the gap closed. We looked forward to the time when that country would have complete protection by

a levee. As it is now our chances of not getting water have been taken out of the picture. It is made a certainty that we will get water if it comes.

I have authorized the filing of a claim for damages against the Government.

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GUY COURTNEY, on behalf of plaintiff, testified:

I have been engaged in the mercantile business and farming in Desha County, Arkansas, for 40 years and know the market value of farming lands in that vicinity. For about 20 years I have known the plaintiff's property which lies two miles West of Arkansas City, the county seat, to which I frequently go. I own land in the Boeuf Floodway.

The fair market value of plaintiff's 40 acres of land before it was put in the Boeuf Floodway was \$100.00 to \$125.00 per acre. After it became generally known that the property was in the floodway it didn't have any value—  
244 something like \$15.00 to \$20.00 an acre.

#### Cross-Examination.

I have gone through all the floods which have inundated that country during the past 40 years. The 1927 flood was a very destructive flood. I was broke before the flood of 1927. When my land got in that floodway, there wasn't any value. I think myself and family are suing for \$120,000.00.

#### Re-Direct Examination.

The water which flooded these lands before the levee was closed at Cypress Creek Gap was run-around water which came in slowly and did no damage. It helped the land because of the sediment.

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T. A. PREWITT, on behalf of plaintiff, testified:

I live in Drew County, Arkansas, where I have been engaged in the mercantile business and farming for 50 years, all my life.

I was President of the Southeast Arkansas National Farm Loan Association which was organized with the aid of the Federal Government for the purpose of borrowing money on farm lands as security through applications made directly to the Federal Land Bank. We made 50 or 60 applications to the Federal Land Bank for loans on property in the Boeuf Floodway, and not a single loan was made because the prop-

erty was in the Boeuf Floodway. I made persistent and continued efforts to change this policy of the Federal Land Bank, by trips to St. Louis, in person and with a party, and by correspondence. After three or four trips to St. Louis we went to Washington and conferred with the heads of the Federal Farm Administration. We were never able to secure a change of the policy of the Federal Land Bank that no loans would be granted to property on the floor of the Boeuf Floodway.

245

#### Cross-Examination.

The Federal Land Bank did make some commissioner's loans in that area. Such loans were not made through our organization. I secured a commissioner's loan the latter part of 1934 on my land 5 miles Northeast of Tillar. It is not within the limits of the Boeuf Floodway as shown on the map.

#### Re-Direct Examination.

I cannot name a single loan ever made by the Federal Land Bank in the area of Boeuf Floodway in Desha County. When our organization was seeking loans the Federal Land Bank declined all our applications.

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BURK MANX, on behalf of plaintiff, testified:

I have lived in Forrest City, Arkansas, all my life, 47 years. I am a lawyer and during my adult career have been engaged in the operation of buying and selling real estate, both farm and city property, on quite a large scale. I represented the Missouri State Life Insurance Company of St. Louis, the Commonwealth Insurance Company of St. Louis, and was President of the Monarch Investment Company, all of which had extensive holdings of farm lands in Desha and Chicot Counties, Arkansas, of which I had personal supervision. The latter part of 1927 I was employed by the Southeast Arkansas Levee District and the Cypress Creek Drainage District to supervise the collection of taxes and look after the foreclosure of delinquencies, and attending all meetings of these Boards and courts for several years. I have been connected with banking and insurance interests with large operations scattered over the State of Arkansas, which have made me familiar with real estate values generally in that State. From personal observation and experience I am familiar with the area in Southeast Arkansas now covered by the Boeuf Floodway. I have known the plaintiff's 40 acres of land in Desha County about 2 miles West of Arkansas

City on the concrete highway since 1926. I was inter-  
246 ested in surrounding lands in that vicinity.

In 1927, before this land was placed in the Boeuf Floodway by the provisions of the Flood Control Act of May 15, 1928, plaintiff's land was worth \$100.00 an acre. With the improvements which plaintiff placed on her land it was worth \$125.00 an acre. After it became generally known in that vicinity that plaintiff's property was in the Boeuf Floodway I imagine it is worth between \$15.00 and \$25.00 an acre. I would not want to buy any property in the Boeuf Floodway, because I don't think it has any value, really. That condition has continued up until this time.

#### Cross-Examination.

I attribute the decline in market value solely to the adoption of the Flood Control Act of May 15, 1928. I don't think the economic conditions had anything to do with it in a permanent way. When the land was put in that spillway, and gave the Government an easement, the right to put water across it, and the ownership was subject to that easement, I think the value of the land was destroyed.

The low price of cotton, overlapping of taxes and heavy tax burdens, and general difficult economic conditions, to a certain extent adversely affect market value, but the farmer who carries a reserve does not pay much attention to economic fluctuations in land values because they come back if you are able to hold them. If one is in financial distress of course that would affect it, but no man who has any reserve pays any attention to slight fluctuation because of economic conditions. During the depression in 1930 there were people practically everywhere who had to put their lands on the market and take what they could get for them. Some lands could not be bought because the owners would not sell them, especially good fertile land. Land below Marianna subject to back water could be bought cheap. Some river bot-  
247. tom land subject to overflow is the very highest price land.

The price of a bale of cotton ranged from \$60.00 in 1926 to about \$100.00 in 1929, then down to \$30.00 in 1932, and back to about \$60.00 in 1934. Some farm lands fluctuate with these prices. If I had owned a piece of land in this floodway and had not known about the passage of the Flood Control Act in 1928, those fluctuations would not have bothered me. Farmers are the most optimistic people on earth. They think that next year is going to put them on their feet. People with



money do not let these economic fluctuations bother them, because it has been my observation that if anybody can hold lands such as these they always come back whether it is worth \$10.00 an acre or \$100.00 an acre.

The Missouri State Life Insurance Company, under mortgage foreclosures, acquired large areas of land all over Arkansas and in other States. 21% of their assets were in real estate. The rest was in bonds and stocks and other things. Their land holdings did not break them. They never lost any money on Arkansas lands because I refused to sell it when the price was below what I thought it was really worth. Land values are now back to about 82% to 90% normal due to conditions being better generally. When people are getting money they will buy land. The people have more money than they have had in this country since 1930.

#### Re-Direct Examination.

After plaintiff's property had been placed in the floodway in 1928, it had no substantial market value in 1929 when cotton was selling at 18c a pound. I think the value of that land was gone. Nobody could borrow any money on it nor get insurance on it. I couldn't figure why anybody would buy it. I do not think the economic conditions would have anything to do with property in that floodway. I do not think property in the floodway would be able to participate, or take  
248 part in, the general upturn and return to prosperity.

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B. C. PREWITT, on behalf of plaintiff, testified:

I am a farm manager and partner in the firm of Tillar Mercantile Company, merchants and planters farming approximately 16,000 acres of land. I live in Tillar on the Desha County line. I have had farming interests, and have been familiar with farming values, in Desha County, for 25 years. I am familiar with plaintiff's 40 acres of land, and its fertility, productiveness and general desirability from the farmer's standpoint.

Before plaintiff's 40 acres was placed in the Boeuf Floodway by the Flood Control Act of May 15, 1928, its fair market value was \$100.00 per acre. When it became generally known that it had been placed in the Boeuf Floodway, its fair market value was around \$20.00 an acre.

In December, 1933, I bought the land adjoining the Spokenbarger 40 acres on the North and East sides, of the same type and character as plaintiff's land. I paid \$20.00 an acre

for it in 1933. Immediately before it was placed in the floodway it was easily worth \$100.00 per acre.

### Cross Examination.

I have recently offered \$30.00 an acre for land adjoining my land, nearer Arkansas City, that is within the proposed ring levee to be built around Arkansas City with levee protection, but could not buy it. (Rec. 754, 757).

I bought 80 acres of land in the floodway in the same neighborhood for \$5.00 an acre. The value of this particular land declined largely due to the Flood Control Act of May 15, 1928.

I am trying to buy more land in the floodway. That land is also directly affected by the provisions of the Flood Control Act of June 15, 1936, which provides for the payment of flowage rights. I am gambling. I am betting on some money somewhere and am going to be disappointed if I don't get it. That is exactly why I am buying it. This land was worth \$100.00 an acre before it was put in the floodway and I think the Government is going to pay something for it.

I have a suit against the Government for \$18,400.00. I have no interest in any other suit at all.

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JUSTIN MATTHEWS, on behalf of plaintiff, testified:

I have lived in Little Rock, Arkansas, for 34 years, prior to which time I lived in Southeast Arkansas, and am generally familiar with the territory of Desha County. I was formerly on the Arkansas State Highway Commission when we constructed roads through there. For the last 20 years I have been in the real estate development business. I am a member of the Executive Committee of the National Real Estate Board, and have tried to keep abreast with real estate values.

I have been personally familiar with the plaintiff's 40 acres of land for more than 30 years, and am thoroughly familiar with the surrounding lands. Before it was placed in the Boeuf Floodway in 1928 I think the plaintiff's 40 acres of land was worth about \$100.00 an acre. Immediately after it was put in the Boeuf Floodway it wasn't worth more than \$20.00 an acre, if it was worth that. I attribute that destruction of its market value to taking it for this floodway.

I am familiar in a general way with economic conditions, the values of commodities, and such things. The change of values generally will not change the situation as to the mar-

ket value of plaintiff's land so long as it remains in the Boeuf Floodway, unless after a long term of years they build  
 250 reservoirs so that the floodway would never fill up. Maybe within a quarter of a century we might decide it is not going to be the channel of the Mississippi River, which I think it is going to be.

### Cross-Examination.

The decline in the market value of this land in the floodway was due solely to the passage of the Flood Control Act of May 15, 1928. No other land began to decline as early as that land did, and the bottom went out of it. Everybody became alarmed that they were going to be made into a floodway, and the land would be taken, and the amount that was left would be sanded or would make blue holes.

Our land in Pulaski County, near Little Rock, beginning in 1926, went up along in 1928 and 1929, and then values all over the State went down until 1934. The 1927 flood disaster did not cause the land in the flood area to decline. We had a lot of land that was overflowed by the Arkansas River which did not go down. These lands had floods right along up to 1916, which was a big flood, and kept on going up in value in spite of these floods.

When Congress passed a bill that limits the height of a levee and lets the rest of them be built up high, that makes the flood certain.

If the fuse plug levee had not been there, the plaintiff's land would have suffered a decline from the effect of the market, but when they left the fuse plug you destroyed the value. You don't have anything to suffer. Good agricultural land does not fluctuate like other land. If a man is making good crops and getting fair prices he would not have it on the market at all. There is just a small amount of this high grade black land with 40 feet of silt, like plaintiff's land, and it is one class of property that does not decline very much.

251 ROBERT A. ZEBOLD, on behalf of plaintiff, testified:

I have lived in Pine Bluff, Arkansas, about 13 years, having come to this State for the purpose of looking after lands in Southeast Arkansas, which had been mortgaged to a company with which I was associated in Oklahoma. Desha County was in our loan area, and I attempted to familiarize myself with all the properties on which we had loans in South-

east Arkansas. I became familiar with the market value of farm lands in that territory. I own myself about 1600 acres of land in Desha County of which 103 acres is in the Boeuf Floodway. I know the location, condition and general characteristics of plaintiff's 40 acres involved in this litigation.

Plaintiff's land was worth about \$100 an acre just prior to the time it was placed in the Boeuf Floodway by reason of the Flood Control Act of May 15, 1928. It was improved farm land. Immediately after plaintiff's land had been placed in the Boeuf Floodway in the years 1928 and 1929, it was probably worth about \$10 an acre. At that time, especially during the year 1929, market values of other farm lands outside of this floodway were advancing until the break in 1930. No part of the loss in market value of plaintiff's land, and land in that vicinity, can be attributed to the economic depression which began in 1930, because their market value had already been destroyed before the depression started.

No part of plaintiff's loss in market value can be attributed to the tax burden because plaintiff's land was wholly in production and she was paying her taxes and was not disturbed by \$1 an acre tax.

#### Cross-Examination.

The tax load did depress market value of unproductive land that could not carry the burden.

252 I have a suit against the Government for \$9,000, but am not interested in any other suits.

E. E. HOPSON, recalled for further cross-examination, testified:

I am interested as an associate attorney with Mr. Lamar Williamson, in a large number of claims which have been filed in the Court of Claims, seeking compensation for property in the Boeuf Floodway taken by the Government under the Flood Control Act of May 15, 1928.

Plaintiff rests.

Whereupon, the defendant, to sustain the issues on its behalf, proceeded as follows:

W. H. MATTHEWS, on behalf of the defendant, testified:

• I live at Lake Village in Chicot County, Arkansas, and am one of the joint owners of the Macon Lake plantation on Highway 65, 8 miles north of Lake Village, and about 18 miles from Arkansas City, located within the Jadwin Plan



Spillway. I purchased my interest in that place in 1934. 2,867 acres of the 6,113 acres are in cultivation. My partner, J. L. Cain, bought the place in 1927. The land sold in 1927 for \$129,000. A main State highway runs through the place for 3 1/2 miles. It is a railroad shipping point on the Missouri Pacific railroad. The place is well improved with dwellings, houses, wells, fences and a cotton gin. In 1936, we made 1100 bales of cotton on 1,037 acres, worth \$80 a bale. In 1936 we were offered \$37.50 an acre for the land and declined the offer. The land is behind the fuse plug levee. I do not regard the adoption of the Flood Control Act of 1928, as having had any appreciable effect upon the market value of this land. Since we purchased this land we have cleared about 150 acres of additional land and made additional improvements on the place including repairs to the gin which is one very large item.

As Receiver for the Macon Lake plantation at the time those claims were being filed against the United States in the Court of Claims, by direction of the bondholders committee in St. Louis, I filed a claim. My partner and I do not desire to press this claim, nor to claim that we have been damaged in any amount by the passage of the Flood Control Act of May 15, 1928. In December, 1934, we borrowed two commissioner's loans, of \$7,500 each through the Federal Land Bank, and in December, 1935, completed the loan with Jefferson Standard Life Insurance Company for \$57,500.

#### Cross-Examination.

I lived in Mississippi prior to 1928, when I came to Macon Lake as an accountant. Mr. Cain and his associates bought the land in 1927, because its then owners couldn't discharge their indebtedness and it had to be sold. In 1934, I had to deal with the Trustee who was acting for the bank that had a mortgage on it. The bondholders filed suit in Federal Court in 1932, and I was appointed Receiver in April, 1933. Mr. Cain bought the land at a forced mortgage sale.

I do not know the plaintiff's land and am unable to compare the market value of the plaintiff's land with the Macon Lake place.

Mr. George Armstead of Little Rock was the attorney for the bondholders who filed the suit for me as Receiver in 1934 in the Court of Claims. I brought the Complaint to Mr. Armstead and signed the affidavit that the cleared land had been damaged \$100 an acre, the entire demand being for \$283,432. (Rec. 814-816.)

I have not heard of any loan being completed in the floodway area through the Federal Land Bank after the property had been put in the floodway.

"Q. I believe your testimony is now to the effect you do not believe the property in this floodway, the market value of the property in that floodway, has been affected at 254 all by being in the floodway?

"A. Damn it, No sir, I don't think it has been damaged by being in the floodway."

We are protected from the flood waters of the Mississippi River by the fuse plug levee. I think the War Department will hold that levee there, look out for it. I haven't heard what stage they would hold it to. I would think they would go ahead and fight against the Mississippi side.

"Q. You don't believe, do you mean, that the engineers are going to let your land be flooded any more?

"A. Well sir, they came in there this year and protected us."

Our lands are also in the new floodway under the Markham Plan. They claim they will let the water in the new floodway on a certain height on the Arkansas City gauge. I did not know that it was exactly the same height fixed by the Flood Control Act of May 15, 1928, namely, 60.5 on the Arkansas City gauge.

I don't think the land is damaged at all until the damage has occurred. If the Government stands there and lets that fuse plug go out I think the Government would pay all the damage done.

I think the market value of Macon Lake plantation, which is in the Boeuf Floodway, has not been affected because it is protected, and has the same protection as the land outside the floodway over west of the Missouri Pacific railroad.

In my opinion, flowage rights under the Jadwin Plan are not worth anything. If they let water get in the floodway under the Markham Plan I think the flowage rights are worth something. Under the Markham Plan we would get water more often. It would change the fuse plug levee.

I have been approached by the Government to enlist my services as an appraiser of the flowage rights that the Government is seeking in the floodway. My understanding 255 is they don't know whether they are going to pay flowage rights, or buy the floodway outright, under the Overton Bill passed last June. I think they should pay some flowage rights if they are going to use it under this new

Overton Bill. I don't think that would affect the market value of the land.

The morning paper reporting me as one of the committee appointed by the United States Engineers to set up an office in Lake Village for the purpose of taking options for flowage rights in the proposed Eudora Floodway in Arkansas and Louisiana under the Overton Act (Flood Control Act of June 15, 1936), is true.

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J. L. CAIN, on behalf of defendant, testified:

I lived in Mississippi prior to coming to Arkansas 9 years ago since when I have lived on Macon Lake plantation 8 miles north of Lake Village in Chicot County, Arkansas. I am a partner of Mr. Matthews who has just testified. I have been a farmer all my life. I acquired this 6,113 acre plantation in 1927, of which 3,000 acres is in cultivation. I bought a one-half interest in the place for the mortgage indebtedness aggregating \$129,000. We were offered \$37.50 an acre for the place in 1936, but did not accept the offer. I couldn't think of a place that would suit me any better, and felt like it was worth that figure, and maybe more. The offer was made by Mr. Frank Masters for the Resettlement. (Rec. 828-833.). I do not know whether or not he had any authority from the Resettlement Administration to make that offer. We didn't want to sell and I didn't ask him.

The price of cotton went down in the Fall of 1929, as I recollect and still down in 1930, 1931 and 1932. I think it started up again about 1933. I cannot say about the land values that followed. I don't remember the date after 256 that. The price of cotton has everything to do with land value in that area. When the cotton went to the lowest figure I don't imagine you could have sold a piece of land in that neighborhood or any other neighborhood, that grew cotton.

All the land I own is in the floodway. The Jadwin Plan did not reduce the value of our land. We finally got the loans on our land described by Mr. Matthews in 1934 and 1935. The stagnation was pretty general. Those were just as hard in Mississippi as in Arkansas.

#### Cross-Examination.

I have never lived in Desha County, Arkansas, the county in which plaintiff's land is located. I am not familiar with market values in Desha County prior to 1927. I did not pay any cash for the lands I bought in Arkansas in 1927, but just assumed the mortgage debt.

I borrowed the money mentioned on these lands after the plaintiff's lawsuit was filed in August, 1934.

I had just as soon have land in the floodway as out of the floodway because after they have completed the floodway these lands in the floodway are going to be paid a reasonable price for it, and we will have a protection more than the others on the outside. If the Government takes any of my land to use it in a spillway I expect pay for it. I do not feel that my land is in either one of the spillways. I feel like I am only in the proposed spillway. We have been protected.

I had some conferences with the Army Engineers at Vicksburg. My statement that the floodway has had no effect on the market value of my land is based first on the fact that I do not think we are yet in any operative spillway, and second when we get in an operative spillway and my property is actually damaged the Government will compensate me. That is the way I feel about it.

257 Any time you turn the Mississippi River on a piece of land you are going to damage that land. We all know that. I do not think the Jadwin Plan will be used. I don't think you can make people believe that there is a threat to turn the river on our land.

In 1937, everybody got ready for the flood on both sides of the river. If the Arkansas and White Rivers had both been at flood stage the property would have been flooded.

### Redirect Examination.

The Macon Lake plantation on which I secured a loan is my home and is well improved. On it are two residences worth from \$6,000 to \$10,000, a store building, a gin worth about \$18,000, a new barn worth about \$2,500, and about 100 two and three room tenant houses.

It is in one drainage district, and one levee district. In my conferences with the Federal Land Bank seeking a loan they talked with me about our drainage district, our levee district, and general conditions along that line. They did not mention the floodway.

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GEORGE F. DAVIS, on behalf of defendant, testified:

I have lived in Lake Village, Chicot County, for about 34 years, during which time I have engaged in the real estate business. At present I am in the automobile business. I am acquainted with the country in general.



I do not think the passage of the Flood Control Act of May 15, 1928, had any effect on the market value of land in the spillway for the reason that land values had slumped some 6 or 7 years before that. We had no special values after that slump. Our slump in land came about 1921, and there has not been any land business of material value down there since. The levee taxes increased to 30c an acre and drainage districts were created which made the taxes so heavy that people quit buying land. I think that was the main cause of our trouble down there. The lumber companies cut the timber off the lands and then let the cutover lands go to the State so that the best land in Chicot County could be bought for \$1 an acre.

The 1927 flood did not have any effect on the market values of our land because our values were gone before that flood. We now own about 3,000 acres in the floodway.

#### Cross-Examination.

We have never handled any lands in Desha County. I have always lived at Lake Village, the county seat of Chicot County. The slump in land values came about 1921 when the Government closed the levee line at the mouth of Cypress Creek and gave the area in the Boeuf Floodway down in our community that levee protection against the "run-around" waters which previously had entered through this opening in the levee and overflowed our lands. That made them slump.

I would absolutely oppose any floodway that would endanger our property. The Jadwin Plan has been abandoned. I base my testimony and conclusions on this premise that the Jadwin Plan has been abandoned and I know we are not in the floodway.

During the 1937 flood, while the water was 300 or 400 miles away from us, by reason of information which came from Washington, a large number of folks prepared to evacuate the floodway area. The United States Army was putting up refugee camps to take care of the inhabitants. Houses were boarded up ready for the people to get out. I thought it was very foolish for our people to sell their chickens and cows and move away, and never thought the water was going to reach us by reason of the cut-offs in the Mississippi River, and other things. This threat of being flooded scares people to death. It had not a particle of effect on the market value of the lands.

If the Arkansas and White Rivers had been in flood stage in 1937, when the crest of the Ohio River flood came down I

still think we would have been protected in our community because the Government can come in there and help the 800 or 900 men there build up the fuse plug levee 3 or 4 feet higher and take the water down the river past Chicot County. I believe the Government Engineers would build up this levee with bags of dirt to hold the water 4 or 5 feet above the levee if necessary.

Good times down in the Delta country are fixed by the price of cotton as a general thing. Last year was a miracle year in so far as production in Chicot County was concerned. It was the largest cotton crop we ever had and the prices were high.

#### Redirect Examination.

I understand that there has been no change in the height of the fuse plug levee but I think the cutoffs in the river have saved the situation for us.

#### Recross Examination.

These cut-offs between Arkansas City and Lake Village were constructed in the last year or two.

As I understand, the Boeuf Floodway, as contemplated by the Jadwin Plan, was never constructed, and we have never yet actually been in a floodway as a result of the construction work done by the Government. The floodway was just a paper plan under the Act of Congress. I don't know whether the floodway would lessen the value of our lands or not. When they asked what I would take for my land under the so-called Jadwin Plan I told them I would take \$40 an acre for my land, and some of my neighbors thought I ought to have \$100. I told them I didn't think we would ever have the Jadwin Plan, and that I didn't want to bother them if they wanted to go ahead and put that plan through. I don't want to put myself up as a prophet, but I told them correctly. We would never have a spillway. I don't think the spillway has ever been in operative condition.

#### Defendant's Exhibit 37.

Mr. Isgrig: I want to introduce in the Record a copy of a Stipulation entered into between counsel in this case, filed in the United States Court of Claims, which exhibit infers that all of these suits are identical issues of liability, and that this is a test suit. It clearly shows the competency of all testimony in these floodways because exactly the same pleadings are filed in all of the suits. I want to file it and make

it a part of the Record to show the admissibility of this testimony.

Mr. Williamson: That would have no part in this case. It was purely a matter of procedure as to what suit should be tried first. We have no objection to stipulating that the Sponenbarger land has been selected as a test case to determine the liability of the United States to property owners in the Boeuf Floodway, and that all claims pending in the United States Court of Claims have been suspended temporarily pending the final decision in this case. That Stipulation has nothing to do with the particular issue in this case as to whether or not the Sponenbarger land, which is located squarely in the mouth of the Floodway, has been taken; and if so, the extent of the damage. That is the sole issue in this case. The Stipulation could not possibly throw any light in determining those simple issues in this case.

The Stipulation referred to is as follows:

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(Defendant's Exhibit 37.)

Motion to Suspend Action Temporarily.

(Filed August 20, 1934.)

In the  
Court of Claims of the United States.

Jefferson Investment Company, Petitioner,  
No. 42721. vs.  
The United States of America, Defendant.

And Other Cases Listed In Schedule "A" Hereto Attached.

Comes Lamar Williamson, as attorney of record for the petitioners in a number of cases listed in Schedule "A" hereto attached as a part of this motion, and come House, Moses and Holmes, as attorneys of record for the other petitioners listed in said Schedule "A" hereto attached, and respectfully move the court to suspend further action in each of the cases listed in Schedule "A" hereto attached, which cases have been recently filed in the Court of Claims, and to permit said cases to remain on the docket without further proceeding therein, until the identical issues of liability can be determined by the Supreme Court of the United States in the test case of J. Caroline Sponenbarger versus the United States of America which is now pending for trial in the United States District Court for the Eastern Division of the Eastern District of Arkansas, No. 892—at law.

The allegations of liability in said test suit pending in said United States District Court are identical to those alleged in the cases listed in Schedule "A" hereto attached. The record on the issue of liability will be identical to that which would be constructed in cases listed in Schedule "A"; and inasmuch as the said test suit pending in the United States District Court will reach the Supreme Court of the United States for final decision with all possible speed, it would be a useless and unnecessary expense to construct a duplicate record.

Most of the petitioners in the cases listed in Schedule "A" are not financially able to meet the expense of developing their cases, and they have been filed in most instances merely to stave the bar of the statute of limitation until a proper test case can be carried to the Supreme Court of the United States for final decision on the identical issue of liability.

Respectfully submitted,

LAMAR WILLIAMSON, and  
HOUSE, MOSES AND HOLMES,  
By W. H. Holmes,

A member of the firm.  
Attorneys for the Claimants.

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## Schedule "A"

## To Motion to Suspend Action

List of Cases filed by Lamar Williamson, as Attorney of Record, to which the attached Motion is applicable.

Case No.	Name of Petitioner	Amount of Claim
42718	Southeast Arkansas Levee District	\$3,000,000.00
42719	Cypress Creek Drainage District	2,500,000.00
42720	Eudora-Western Drainage District	2,520,000.00
42721	Jefferson Investment Company	25,000.00
42722	Anna B. Hight and Farel Hight	42,500.00
42723	John Lynn Parker	142,640.00
42724	Tom H. Free	82,000.00
42725	Tillar Mercantile Company, T. R. H. Wolfe, Trustee, et al.	434,575.50
42726	Lewrench Wolfe	174,665.00
42727	E. E. Hopson, Sr., as Guardian of Edwin E. Hopson, Jr.	132,480.00
42728	W. Elmo Thompson and Edwin E. Hopson	14,720.00
42729	Thomas D. Newton, Noel D. Newton and James A. Newton	38,284.00
42730	Bertie C. Prewitt	18,400.00



42731	Edwin E. Hopson	65,500.00
42732	Passumpsie Savings Bank	75,000.00
42733	Jesse R. Prewitt and Taylor A. Prewitt	73,400.00
42734	Guy H. Courtney and Emma E. Courtney, Ethel M. Courtney and Charles James Courtney	120,100.00
42735	C. Turner Neal	60,000.00
42736	Vestal Lumber & Manufacturing Company	35,000.00
42737	Fannie Stroud	39,565.00
42738	Edward C. Hussleton	13,400.00
42739	William M. Snow	17,600.00
42740	William C. Reitzammer	21,600.00
42741	Ed McCaughy and Hugh Lee Williams	31,000.00
42742	Proctor Trust Company	39,219.20
42743	Proctor Trust Company	10,938.80
42744	Passumpsie Savings Bank	10,660.00
42745	Abner McGehee, Scott McGehee and Wylie A. McGehee, Trustees	93,206.00
42746	R. H. Wolfe, Attorney in Fact of T. F. Tillar	75,200.00
42737	Jesse McDonald and Florence D. White	183,160.00
42768	Albert Carl Zellner, Roy M. Zellner, Mrs. Harry E. Zellner, et al	188,240.00
42769	James L. Flowers	17,640.00
42770	F. D. Douglass Estate	28,370.00
42771	Flöyd Matson, Adm'r of the Estate of W. D. Halley	45,000.00
42780	Walter E. Taylor and Thomas E. Trimble, Jr.	31,000.00
42775	R. J. Heckney Lumber Co.	70,236.00
42776	Thompson-Katz Lumber Co.	81,540.00
42777	Turner Lumber Co., et al.	244,498.00

List of Cases Filed by House Moses and Holmes, as Attorneys of Record, to which the attached Motion is applicable.

Case No.	Name of Petitioner	Amount of Claim
42754	Sam J. Wilson	311,000.00
264 42755	Joe W. Pugh	156,859.00
42756	John C. Wells	125,370.00
42757	Med Cashion	18,000.00
42758	Moris Rosenzweig	76,165.00
42759	New Netherlands American Mortgage Bank, Ltd.	467,460.00
42760	(Petition Printed)	
42761	Ike H. Noyes, et al.	64,400.00
42762	Georgia Pembroke	23,310.00
42763	Pete Mulligan	40,194.00
42764	Sam Epstein	468,387.00
42765	Victor B. Keiffer, et al.	54,910.00
42766	Jacob C. Gillison	85,239.00
42773	Macon Lake Plantation Company, et al.	283,452.00
42774	Sorrells O. Savage	64,170.00

265 HENRY MOORE, on behalf of defendant, testified:

I have been County Clerk of Chicot County since last August, and have lived in Chicot County since 1917, working as a bookkeeper. I have checked the records of the history of tax growth and forfeitures for taxes in Chicot County.

The following acreages for the years indicated were certified to the State for nonpayment of taxes, to-wit: for 1909, 109.86 acres; for 1910, 278.72 acres; for 1911, 356.78 acres; for 1912, 746.51 acres; for 1913, 307.58 acres; for 1914, 366.05 acres; for 1915, 451.70 acres; for 1916, 57.50 acres; for 1917, 1,411.07 acres; for 1918, 14 acres; for 1919, 487.45 acres; for 1920, 2,624.42 acres; for 1921, 3,406.01 acres; for 1922, 4,937.22 acres; for 1923, 21,835.71 acres; for 1924, 19,405.28 acres; for 1925, 8,614.15 acres; for 1926, 5,748.27 acres; for 1927, 40,305.48 acres; for 1928, 25,674.11 acres.

I do not think the passage of the Flood Control Act of 1928, affected real estate values in Chicot County. After 1921 there was a decrease in values. Then there was an improvement up to 1926. Thereafter there was a decided let down in values of all kinds. The low price of cotton together with the high cost of taxation destroyed the profit. The forfeitures of land back to the State steadily increased and affected the market value of other lands in the community. The 1927 flood temporarily affected values to some extent. The area in which I live in Chicot County is protected by the so-called fuse plug levee.

#### Cross-Examination.

I am not familiar with Desha County, nor the flowage rights there as covered by the Jadwin Plan. I do not know what proportion of the figures I have given from Chicot County are from areas within the confines of the Boeuf Floodway. I do not know how much of that acreage was immediately redeemed from the State of Arkansas. In Arkansas improvement districts are created by vote or petition of the majority of property owners of the territory affected. The purpose of the drainage districts was to take care of the water which had been flowing through the Mississippi River through Cypress Creek in order to close the gap in the levees at that point; and that burden was for the purpose of ultimately securing flood protection.

#### Redirect Examination.

The list of lands forfeited which I have given do not include large acreages which were forfeited to the improvement districts.

### Recross Examination.

If the floodway had ever been actually created by the construction work authorized by the Flood Control Act of May 15, 1928, that would be different as to the effect on market value of lands in that area between the gulle levees. My testimony is based on my understanding that the country to which I refer has never actually been in any floodway yet.

G. A. McGEHEE, on behalf of defendant, testified:

I live at Lake Village and own 285 acres of land within the floodway of the proposed Jadwin Plan. I have lived in that community about 37 years. The passage of the Flood Control Act of May 15, 1928, providing for the fuse plug levee and the floodway, did not affect the market value of my land. The market value of my land took a drop about 1921 because of high taxes for drainage and levee purposes. This resulted in large forfeitures of land to the State and the improvement districts. Conditions in Chicot County are about the same as those in Desha County. The value of land follows the price of cotton in fluctuating. The cut-offs in the Mississippi River have lowered the height of water from 5 to 6 feet I imagine.

I recall the floods of 1912, 1913, 1916 and 1927. The 1927, was the biggest flood we ever had. It was not destructive or damaging to any great extent.

### Cross-Examination.

267 Lake Village, being on what was once the main channel of the Mississippi River, is higher than the territory west of Lake Village. The area between Lake Village and Montrose crossed by the Boeuf Floodway is low and swampy.

I understand that the Jadwin Plan is in effect, and that the Boeuf Floodway has been created as a physical fact. They left the levee on our side low and then raised the levee on the Mississippi side, and I think that we have been in the floodway ever since the Act was passed.

I had rather have land inside the floodway than outside because overflows deposit soil and makes the land better.

A. E. DABNEY, on behalf of defendant, testified:

I live in Lake Village, Chicot County, Arkansas, where for 23 years I have been engaged in the mercantile, hardware and real estate business.

I owned two tracts of land in 1921 when the slump came which proved very expensive to us. Then these improvement district taxes came on and it put the real estate men out of commission. Some advance took place during 1925, and 1926, when cotton advanced. Real estate is governed principally by the price of cotton. Large acreage of cut-over land were forfeited to the State and could be purchased very cheaply, at a dollar an acre for the State's claim. That affected the market price of other lands in that community, which is in the Boeuf River Basin.

There were large tracts of cut-over land that went delinquent and could be bought from the State very cheap. The Jerome Hardwood Lumber Company let a whole township of cut-over land go delinquent.

I am not familiar with any particular farm land or place in Desha County, but have been to Arkansas City, and know that the character of land is practically the same as in Chicot County.

I don't think the passage of the Flood Control Act of 1928, reduced the market value of land in the Boeuf River Basin.

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## Cross-Examination.

In my opinion all of the lands in the alluvial valley of the Mississippi River in Southeast Arkansas, and the State of Mississippi, and in Louisiana, are equally subject to flood. The value of these lands went down when the timber was cut off of them.

I am not familiar with the lands in Desha County, nor with the plaintiff's land involved in this lawsuit. What I have said is intended to be applicable to the general character of lands in the Boeuf River Basin.

When the levee gap at Cypress Creek was closed giving levee protection in Southeast Arkansas, I did not pay taxes on cutover timber land not in cultivation. This is not applicable to cultivated land like the plaintiff's.

I have never studied the question of whether any of the construction work authorized by the Flood Control Act of May 15, 1928, had any effect on property in the Boeuf Floodway. I do not understand that the property has ever actually been in any existing potential floodway as designated by the Flood Control Act of May 15, 1928. There has never been any occasion to use the land laid out in that law, or the floodway proposed by that law. I do not think as a physical fact we have ever been in the floodway up to now. 75% of



the people in Chicot County did not believe the Jadwin Plan would ever be perfected. In my opinion, it never has been, and never will be. 75% of the lands in Chicot County west of Lake Village in this proposed Jadwin Plan were timber lands that at that time had no value. My testimony relative to how values have been affected by the floodway are based on the assumption that the floodway has never actually been put into operative condition.

It is well known that tax titles from the State of Arkansas are merely equitable, and people don't pay much attention to a tax title. A tax title isn't actually good until it is followed by actual possession for a period of limitation.

If this levee of the 1928 Act had been made, and it looked like a sure fact that this whole Boeuf Basin Floodway was going to be swept and flooded, then I wouldn't want land in that spillway. It might be as valuable but you have that hazard that is greater than one living under the protection of the levee. I don't think I said that the authorization of that hazard has had no effect on the values of land in that floodway. I said there was no market value in these lands at the time the Jadwin Plan was passed by Congress, referring to wild, cutover land. Placing a farm in actual cultivation in an actual floodway would affect the market value of that farm if it were a settled fact that the land was going to be placed in a floodway. It is my understanding that what is designated on the map as the Boeuf Floodway in Southeast Arkansas, is a condition that has never existed.

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F. C. HOLLAND, on behalf of defendant, testified:

I am 70 years old and have lived in Lake Village, Chicot County, Arkansas, about 19 years, moving there from Pine Bluff, Arkansas, where I lived about 12 years. I have been in the real estate business, and was selling land in Chicot County in 1912, 1913 and 1914.

The passage of the Flood Control Act of May 15, 1928, did not affect the market value of land in Desha and Chicot Counties so much with the local people as it did with non-residents who were looking for protection. Of course newspaper's stories of the 1927 flood had a whole lot to do with it. The thing that hurt the sales of land near that area of country was excessive taxes that existed generally over the country. I lost for taxes some land I owned at Tripp Junction in Desha County. These taxes began to accumulate for

improvement districts for levees, drainage, and roads,  
270 about 1915.

The fluctuation of the price of farm products is reflected in the fluctuation of the price of farm land.

The demand for these lands has been increasing for the last 5 years ever since the lands were forfeited to the State and people began taking them under the homestead law or buying them and selling. I presume there are about 1,000 new families in Chicot County that have taken up these lands from the State and built homes on them.

#### Cross-Examination.

These people who buy land from the State at \$1 an acre, or homestead it, commonly called "squatters," do not have any real substantial purchasing power. They clear the land up and put it in cultivation. In 1936, we had unusually large crops which, from past experience, we cannot hope to have repeated from year to year. Cotton sold to as high as 14c and brought a large amount of money into Chicot County in the Fall of 1936. I made more sales last year than I had in 3 or 4 years, and even then had to make the sales on easy terms and long payments. I am referring to Chicot County, and in the lower part of Desha County you will see that kind of population. They are all squatters and have taken up land. These people began coming in there by the hundreds in 1927 when we were flooded bad and the Red Cross was in there spending money. Chicot County has the record of having more people on relief than any other county.

Of the area of the Boeuf Floodway which is in Chicot County I would say about 15% is in cultivation and the remaining 85% is wild, swamp, cutover timber land. That timber land was not injured by the 1927 flood. The actual physical damage of the 1927 flood to that land in Chicot County was negligible. After the flood got off it was just as good as it had ever been.

I understand that the fuse plug of the Jadwin Plan, in  
271 front of the area I have referred to as the Boeuf Floodway, has not been completed, and the Boeuf Floodway has never been in an operative condition. It is my understanding that the plan has been modified by the Overton Act.

Land in a floodway would not have as much value as land of the same type and character outside of the floodway where it is protected. I would say that the Jadwin Plan did affect

the value of cultivated lands in Chicot County to the extent of 10% of their market value, but it was high taxes which destroyed all the market value.

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W. V. FARRELL, on behalf of the defendant, testified:

I am a city mail carrier, in McGehee, Desha County, Arkansas, where I have lived about 15 years. I bought 120 acres of land in the Boeuf Floodway about 1933, and have got most of it in cultivation since I bought it. I don't think the passage of the Flood Control Act of May 15, 1928, affected the market values of land in that area.

#### Cross-Examination.

I paid \$500 for the first 40 acres I bought about 10 miles northeast of McGehee. It was very fertile land, as fine as any in the country, as rich as the reputed Nile Valley, making a bale of cotton to the acre year in and year out. About 17 acres was in cultivation with one tenant shanty on it. I bought the adjoining 80 acres of land from the State for \$1 an acre, and paid the original owner \$1 an acre. I have paid all taxes and improvement district assessments.

I understand that my land is now in the actual, potential, operating floodway, which means that when the water reaches a fixed gauge at Arkansas City the fuse plug levee will blow out and overflow the land. If the Government exercises its right to overflow my land, I expect \$100 an acre for damage to my cultivated land and \$25 per acre for the woodland.

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#### Redirect Examination.

I new my land was in the floodway and might overflow some time when I bought it. I don't think I am damaged \$100 an acre now just because the flood will go over the land some time in the future. I know some land in that area was actually benefited by the flood of 1927, by the sediment that the water left on it.

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R. F. Cox, on behalf of defendant, testified:

I have lived in Dumas, Desha County, about 35 years, and own about 1,500 acres of land. It is not in the Boeuf Floodway, nor affected by the fuse plug levee. I am not familiar with the floodway area of the country and never go down there. I am not familiar with the value of land in the floodway. The proposed floodway does not come near Dumas. Generally speaking the price of cotton largely governs the price of land.

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G. L. STEWART, on behalf of defendant, testified:

I live in McGehee, Arkansas, and operate a timber business. I bought 240 acres in the floodway in 1932, since which time I have lived in Desha County. I have cleared and put in cultivation about 200 acres of the land and built 11 houses on it. I knew the land was in the floodway when I bought it for farming purposes. There has been an increase in the value of good farm lands in the area where my land is since 1930.

#### Cross-Examination.

I know nothing about the character or conditions of land in Desha County prior to the time I got there in 1930. The map shows that the land I bought is considerably north of the authorized Boeuf Floodway and would be protected under the Jadwin Plan. I don't know anything about that spillway. When I bought the land in 1930, I did not know that the guide levees would never be constructed. The map shows my land in an area that is designed to be protected  
273 by the Jadwin Plan.

In 1932, I bought 55 acres of this land in the woods from a woman in Mississippi for \$10 an acre. As to fertility and productivity there is no finer land anywhere. I bought 80 acres of the land from the State at \$2. Last year the land produced from a bale to a bale and a half of cotton per acre. If that land had flood protection I think it would be worth at least \$200 an acre.

I do not know of any land having absolute flood protection that will make one to two bales of cotton per acre. I do not regard land behind any kind of a levee as having absolute protection.

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C. W. MEADOR, on behalf of defendant, testified:

I live in Dumas, about 30 miles from Arkansas City, in Desha County, and do not own any land affected by the fuse plug levee, nor in the floodway. I own 1100 acres that was affected by the Pendleton break in the Arkansas River levee in 1927. I started buying this land in 1932.

I do not think the passage of the Flood Control Act of 1928 affected the market values of farm lands, referring to the territory around Dumas and in Desha County that was overflowed by the break of the Arkansas River at Pendleton.



## Cross-examination.

In all my land dealings I never heard the floodway mentioned in buying and selling land. I had rather have land inside the floodway because in the overflow conditions that I have known since I have been here for about 20 years they always leave a sediment on the land that makes it better. This very land that I bought was nothing but a Pin Oak flat until the flood went in there and left about 18 inches of silt on it, and now it is the best land in the country. In my opinion, therefore, having land in the floodway will tend to increase the market value and desirability of it.

274 None of the lands I own, which were overflowed by the 1927 flood, are in the Boeuf Floodway.

I am a druggist.

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W. F. RANA, on behalf of defendant, testified:

In 1930, I bought a little land near Watson in the overflow country and live on it. It is very fertile and desirable land, about 10 miles out from Dumas.

## Cross-examination.

The land is not in the Boeuf Floodway. The lands were overflowed from the Arkansas River in 1927, but are now protected by the 1928 grade and section levees which have been built on the south bank of the Arkansas River.

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J. C. GOULD, on behalf of defendant, testified:

I have lived at Rohwer, in Desha County, about 12 years and own 15 or 20 tracts of land aggregating about 2,000 acres which I have been buying for about 20 years and putting it in cultivation. This land would overflow from a break in the floodway. I do not think the passage of the Flood Control Act affected the market value of land in that county.

## Cross-examination.

I have been approached to be one of the appraisers for flowage rights in that area. About 200 acres of my land is in the Boeuf Floodway and the balance of the 2,000 acres is not in the floodway. My land was overflowed in 1927, from the Arkansas River. I bought my last 40 acres, 5 miles north-east of Rohwer, about 90 days ago for \$1 an acre. I bought 120 acres of very fine land about 5 months ago for \$500. My land cost me anywhere from \$1 per acre to \$10 per acre in the woods. I have developed the land myself. There

wasn't any value to land in 1928. I do not know when the plaintiff bought her land. If she paid \$100 for it in 275 1927, I think she paid the fair market value. I think the plaintiff's land could be sold after it was put in the floodway for \$100 an acre, but I will not offer that. I am not a land buyer. In my opinion plaintiff's land was worth \$75 to \$100 an acre in 1929.

My idea is that the Boeuf Floodway as designed by the Flood Control Act of May 15, 1928, has never become operative. I have never considered what would be the fair damage to land if the floodway ever becomes in a condition to actually function as a floodway because I never did think the original plan would go through. The engineers about 90 days ago were trying to prevent the levee from breaking at Yancopin on the Arkansas River. I did not know that under the present law it was the duty of the Army Engineers to prevent the levee from breaking at that point.

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WILLIAM KURTEN, on behalf of defendant, testified:

I have been associated in a legal capacity with the Army Engineering Corps at Vicksburg, since 1929, having been a practicing lawyer in Lake Village, Arkansas, prior to that time. I identify the statement referred to by the witness J. L. Parker, which I took, and which he signed in my presence after it had been taken down in Arkansas City by a stenographer, which I file as Exhibit 39.

Cross-examination.

It has been a part of my duty to gather testimony on behalf of the Government and I have spent a great deal of time doing that. I interviewed most of the witnesses who have testified for the Government. We took the statements of Mr. Cain, Mr. Rana, Mr. Meadow, Mr. Davis and Mr. Holland, who have testified, on a boat in the Mississippi River, in the presence of certain Government Engineers and attorneys. In securing these statements I have not told any of these witnesses that the Boeuf Floodway under the Jadwin Plan had been abandoned.

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Defendant's Exhibit No. 39.

Arkansas City, Arkansas

February 20, 1935

Statement of JUDGE J. L. PARKER, Arkansas City, Arkansas.

Q. What is your name?

A. J. L. Parker.

Q. How old are you, Judge Parker?

A. 51 years old.

Q. How long have you resided in Arkansas City?

A. Thirty years.

Q. Do you have planting interests in this vicinity?

A. I have, yes, sir.

Q. Are you the owner of what is known as De Soto Plantation about six miles above Arkansas City?

A. Yes, sir.

Q. How many acres are there in that tract?

A. Approximately six thousand acres.

Q. How much do you have in cultivation?

A. Around seven hundred.

Q. How long have you owned this, Judge?

A. I have owned it seven years, I guess.

Q. What time in 1928 did you buy?

A. I'm not positive. Either 1928 or 1929. The record is at home.

Q. But you bought either in 1928 or 1929?

A. Yes, sir.

Q. What is the character of the land?

A. It is black loam, buckshot loam.

Q. What effect did the 1927 flood have on the houses and improvements and the value of the land?

A. It washed everything away. Practically destroyed everything.

Q. What effect did the 1927 flood have on the saleable value of the lands?

277 A. We have had floods before and they did not do so much damage. But the 1927 flood was extraordinary. The levee had been built up, but there was this gap in here. The flood destroyed the value of the land.

Q. You know the Sponenbarger land described as Southwest Quarter of Southwest Quarter of Section 31 in Township 12 South, Range 1 West?

A. Yes, sir. I know that place.

Q. What effect did the flood of 1927 have on this place?

A. Destroyed the value of it. The flood and things after the flood destroyed the value.

Q. What would you consider the Sponenbarger land worth?

A. Now?

Q. Yes, sir.

A. I don't know, Mr. Kirten. It's just hard to determine. The soil is as good as it ever was. They paid \$100.00 an acre for it. Cash.

Q. It produces fine crops?

A. Yes, sir. No better land in Arkansas.

Q. Since the flood it produces good crops?

A. Yes, sir.

Q. Except in extreme drouth and the boll weevil?

A. Yes, sir. It produces good crops.

Q. Is your land the same character as Mrs. Spönenbarger?

A. Yes, sir, same character of soil. Two thousand acres of my land are red Arkansas River land.

Q. Would you consider that good land?

A. Fine as in Arkansas.

Q. Judge Parker, what did you consider the Spönenbarger land worth before the flood of 1927?

A. Worth \$100 an acre, choice piece of ground and nicely located.

Q. How much do you consider it depreciated after the flood?

A. Couldn't get over \$25.00 or \$30.00 an acre today. I don't think he could get that for it today. Several things enter into it, the economic situation for the past several years has been bad. The spillway hasn't caused all this depreciation.

J. L. PARKER.

279 FRED BAYLEY, on behalf of defendant, testified:

I live in Vicksburg, Mississippi, and have been employed by the United States Government Engineers since October, 1936, gathering data on land ownership, including assessments and bonded indebtedness and tax conditions in levee and drainage districts in the proposed floodway. I have prepared and filed a map giving such a taxation picture of the various areas composing Desha and Chicot Counties. In 1918 for Desha County aggregate taxes and assessments ranged from 14c per acre to \$1.37 per acre in the various areas. In 1925 the aggregate tax burden of the same areas ranged from 90c per acre to \$1.52 per acre. In 1926 the State of Arkansas assumed the road improvement district bonds which were secured by liens on the areas involved. In 1934 the aggregate tax burden on the respective areas averaged from 16c per acre to \$1.73 per acre, the 16c per acre land being of course on the river side of the levee. The plaintiff's land is in the classification of an average of from \$1.01 to \$1.06 per acre.

From 1933 to 1936 witness was employed by the Federal Land Bank of St. Louis, in making investigations of financial, economic and tax conditions in numerous counties in Alabama, Mississippi and Louisiana, under the supervision of the chief engineer and appraiser. Witness testified from



maps of Desha County showing the tax fluctuations from 1918 to 1922 and 1934. - The land in and around Arkansas City, which was assessed for state, county, school, highway, Southeast Arkansas Levee and Cypress Creek Drainage District averaged about 92c per acre for 1918. In Drainage District No. 4, which is the southeast portion of the county, the taxes averaged from 87 to 91c per acre. This was before the Improvement District taxes became such a burden on the land. In the northwest portion of the county the taxes averaged about \$1.37 per acre. This was caused by the overlapping of the Cypress Creek Drainage District and the Kirsch Lake Drainage District. The lands were paying both taxes. This map for the year 1918 was offered and received in evidence as Exhibit 40.

Improvement District Taxes on lands in this vicinity increased from 75 to 100% between 1918 and 1925. That portion of the land in the northeastern part of Desha County shown by the blue legend under Cypress Creek Drainage District was assessed with an average tax from 90c to \$1.08 per acre for the year 1925. The land south of there, in the southeast part of the county, which was in the Cypress Creek Drainage District and Southeast Arkansas Levee District and Arkansas-Louisiana Highway, averaged over \$1.35 to \$1.37 per acre, owing to the school districts that they were in. East of McGehee the average aggregate tax was about \$1.52 per acre. The map was offered and introduced in evidence as Exhibit 41 for the year 1925. In 1926 the Martineau Road Law relieved these lands of the payment of the Highway Improvement taxes. Another map was offered and received and made part of the record, marked as Exhibit 44, which showed the condition of Chicot County for the year 1925. At that time there were seven highway improvement districts and seven special drainage districts, and the various taxes assessed in the different areas depended upon the overlapping of these districts. The taxes averaged from 24c to \$2.15 per acre, the 20c land being on the river side of the levee.

Exhibit 45 shows as follows: "In the Middle Slough Drainage District, which is represented by the yellow legend in the southeast part of the county, the taxes average \$1.71 to \$1.84, while in Bayou Macon, which is in the extreme southern end of the county, represented by the black legend, the taxes average from \$2.05 to \$2.07 per acre."

Witness produced a tabulated statement from the records from Desha and Chicot Counties showing the mortgages

from which he testified and which was offered and received in evidence and marked Exhibit 47:

281 (Exhibit 47.)

"The records show the following mortgages, with the dates and amounts: 2

"J. R. Prewitt to St. Louis Joint Stock Land Bank, \$2500.00, November 26, 1935. The proposed guide levees would be run right through this land. These guide levees have never been built. Since there will be no guide levees these lands are in the so-called flood area.

"Leroy and Mary Odem and John and Molly Burns, to the Federal Land Bank of St. Louis, \$1800.00, July 21, 1936.

"Frank and Willie Bond, to the Southeast Arkansas Credit Corporation, \$1,000. These lands are entirely within the spillway.

"J. F. Wallace and wife to the Land Bank Commissioner, \$1700.00, October 1, 1934. This land is entirely within the floodway. It is entirely within the proposed guide line levees.

"Lawrence Wolf and wife to the Federal Land Bank, St. Louis, \$1500.00, May 25, 1934. The proposed guide line runs through this property, leaving 9/10ths of it inside of the proposed guide line.

"A. Z. Roberts and Annie C. Roberts, to American Life Insurance Company, \$2250.00, January 14, 1937. This land would be within the guide levees.

"C. C. Hawkins and wife to McGehee Bank, \$2,000, January 4, 1937. This land is entirely within the limits of the guide levee lines.

"W. H. Haberyam and wife to General American Life Insurance Company, \$750.00, January 15, 1936. This land would be between the guide lines.

"S. C. Riley and wife, to the Land Bank Commissioner, \$1300.00, March 1, 1936. This land is entirely within the proposed guide line limits.

"J. C. Scroggin, to the Federal Land Bank, \$550.00, December 17, 1931. This land is entirely within the proposed guide limits.

"Z. E. Webb and wife, Federal Land Bank, \$900.00, March 8, 1935. Entirely within the proposed guide levees.

"J. L. King and W. H. Matthews and wife, November 1, 1934, to the Land Bank Commissioner, \$15,000. This land is located on Macon Lake and is entirely within the proposed floodway and limits.

"I. L. Gilliam and wife, to the Land Bank Commissioner, \$1800.00, July 1, 1935. This land lies entirely outside the proposed guide levee limits.

"Tillie B. Fiebelman, to the Land Bank Commissioner, \$5,600.00, and another from H. Dovey Crabtree, to the Federal Land Bank of St. Louis, \$2,000, January 2, 1935.

282 "William T. Files, to the Federal Land Bank of St. Louis, \$3500.00, June 1, 1934. This land is within the proposed guide line levees.

"M. M. O'Neal and wife, to the Federal Land Bank of St. Louis, \$10,000, November 1, 1930. This land lies entirely within the proposed guide lines.

"Clinton Cockrell and wife, to the Federal Land Bank of St. Louis, \$2200.00, January 1, 1929. Proposed guide line levee passes through this property.

"Maggie Barns to Federal Land Bank, St. Louis, \$11,000. November 1, 1935.

"W. B. Devampert and wife, to the Federal Land Bank, St. Louis, \$50,000, February 1, 1934. The proposed guide line levee passes through this property.

"E. H. Dunning and wife, to the Federal Land Bank, \$1700.00; April 1, 1934. This property lies entirely within the proposed guide line limits.

"The deed record shows a deed from J. B. Proctor and wife to E. A. Weir, consideration of \$12,600.00, and mortgage from John W. Ware and wife to the Federal Land Bank, \$5250.00, dated October 26, 1936. The proposed guide line levee passes through their property.

"Ben Epstein to Federal Land Bank, \$400.00, May 29, 1936. This property lies entirely within the proposed guide line limits.

"Helen Epstein to Federal Land Bank, consideration \$300.00; May 5, 1936. This property is entirely within the guide line levee.

"Mose and Estelle Dove, to Federal Land Bank, \$800.00, May 5, 1936. This property lies entirely within the proposed guide line limits.

"Helen Epstein to Federal Land Bank, \$700.00, October 31, 1934. This property lies entirely within the limits proposed for guide line levees.

"J. C. and Viola Davis to the Federal Land Bank, \$600.00, September 15, 1936. This land lies within the guide levee limits.

"W. L. Partain and wife to the Federal Land Bank, \$3700.00. July 28, 1936. This property lies entirely within the proposed guide limits.

"Hammond Ranch Corporation to Federal Land Bank, \$900.00, November 8, 1935. Land entirely within the proposed guide line limits.

"Bessie and John D. Abels to Federal Land Bank, \$450.00, November 8, 1935.

"S. P. Gore to Federal Land Bank, \$450.00, November 16, 1936.

283 "A. C. Roscher to Federal Land Bank, \$2600.00, November 4, 1933. Land entirely within proposed limits.

"Alfred Mays to Federal Land Bank, October 5, 1933. Also within the limits.

"W. L. Manning and wife to Federal Land Bank, \$300.00, February 1, 1935.

"H. Williams and Ella Moore to Federal Land Bank, \$1250.00, November 2, 1936. Lies within proposed guide limits."

This tabulation is filed as Exhibit 46 and 47, to which evidence the plaintiff at the time objected and saved her exceptions of record.

In Chicot County: In 1918 taxes ranged from 3c per acre to 60c per acre; in 1925 from 24c per acre to \$2.15 per acre; and in 1934 from 21c per acre to \$1.54 per acre.

I have also examined the mortgage records of Desha, Chicot and Ashley Counties and exhibit a map of the Boenl Floodway on which is indicated the location within the floodway of a number of tracts of land which the mortgage records show have been mortgaged since 1930 to The Federal Land Bank of St. Louis, Missouri, most of which mortgages are dated in 1935, 1936 and 1937.

#### Cross-Examination.

I have never lived in the State of Arkansas and have no personal familiarity with any of the conditions in Desha



County or Chicot County. My testimony is based purely on an examination of the records. I know nothing about the conditions, or difference in fertility, of either of the tracts of land referred to, nor have I any idea of the conditions which led up to the transactions about which I have testified. I have not examined the properties at all. I cannot testify as to the total acreages involved, nor what proportion thereof is in cultivation and what is in timber. Only two of the tracts referred to are located near the plaintiff's land, viz., the C. C. Hawkins mortgage to McGehee Bank and the J. C. Scroggins mortgage to The Federal Land Bank. I do not know whether or not Mr. Hawkins' financial condition justified the comparatively small loan of \$2,000.00 on his own financial statement alone. I also would not know if The Federal Land Bank had sold Mr. Scroggins that land and just took a mortgage back for the purchase price amounting to only \$555.00. Only ten of the transactions to which I have testified are in Desha County, and I do not know how many of them represent sales made by The Federal Land Bank in comparatively recent years for the purchase price of which they merely took mortgages back.

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BEN F. McWHORTER, on behalf of defendant, testified:

I am an employe of the Vicksburg United States Army Engineering District, and have prepared graphs showing the trend of cotton production in the floodway area. The graph referred to by witness was offered and received in evidence and marked as Exhibit 48. I have shown Chicot, Desha and Lincoln Counties in which the production has a steady increase all through the various counties up to 1926, with decided drop in 1927, back-up in 1929, another drop in 1931, and then a falling off after that date. The vertical scale is in 500-pound bale, the yearly production and the horizontal scale is in years and you can see there the years and apply the number of bales for the year on the vertical line and it becomes a graph showing the relation of one year with another on cotton production. For instance, in 1922, there is shown a little over 10,000 bales a year and you follow it through and Chicot County was a little over 10,000 in 1923, Desha area was a little over 15,000 in 1924 and 1925. You have a gradual rise there and the period of the graph is 1922 to 1934 going from the time that the proposed 1928 or rather the Jadwin Act was enacted and that time at which it became known. Witness also introduced a map showing the location of various counties which was offered and accepted in evidence as

Exhibit 49. The witness also introduced and testified  
 285 from graph 53, which was offered and received as  
 evidence and marked Exhibit 51, and graph 52 which  
 was offered and received in evidence and marked as Exhibit  
 52. Witness produced graph No. 19, from which he testified  
 and which was offered and accepted in evidence, and marked  
 Exhibit 54: This graph was prepared to show the trend in  
 the price per acre of farm lands over the entire United  
 States. It was prepared by the same procedure as to scale  
 as to the previous graph. However, the period has increased  
 from 1912 to 1935 and the vertical scale is in percentage. It  
 is based on estimating the values of 1912, 13 and 14 as 100  
 per cent. I have covered three different sections of the United  
 States as a whole being the blue line, the west central states  
 which included Arkansas, Louisiana, Oklahoma and Texas  
 and the east south central states. This data was taken from  
 the Agricultural Year Book of 1935, which is a Government  
 Publication and the data in this book was in productivity as  
 to states. It will be noted that the values remain pretty much  
 the same from 1912 to 1915 and then there is a sharp decline  
 o 1920, except the south central states. This increase was  
 almost uniformly lost, about 50% of it by 1922. The south  
 central states showed a partial recovery going up in 1925.  
 There is no large fluctuation between 1925 and 1930 but a  
 gradual decline, and then the depression from 1930 to 1937  
 is uniform throughout and the rise from 1933 to 1935. The  
 report of the census within the Boeuf Floodway of Arkansas  
 shows that in 1929 Desha County's population was 1,547. In  
 1936 it was 2,375, an increase of 828 people, or a percentage  
 of 36. I have also taken from the records of the Department  
 of Agriculture and Department of Commerce prices of cotton  
 as follows: for 1922, 22.8c; in 1923, 28.7c; in 1924, 22.9c; in  
 1925, 19.6c; in 1926, 12.5c; in 1927, 20.2c; in 1928, 18c; in 1929,  
 16.8c; in 1930, 9.5c; in 1931, 5.7c; in 1932, 6.5c; in 1933,  
 286 10.2c; in 1934, 12.4c.

The census reports of the floodway in Desha County  
 show a population of 1547 in 1929 and 2375 in 1936, an in-  
 crease of 828 people. In the floodway in Chicot County is  
 shown a population of 6812 in 1912 and 8833 in 1936, an in-  
 crease of 2021. Ashley County had a population of 2742 in  
 1929 and 3652 in 1936, or an increase of 910.

#### Cross-Examination.

The cotton production figures I have given cover all of each  
 of the counties named, and is not limited to the area within  
 the proposed Boeuf Floodway. I show the proportion of  
 each county within the proposed floodway from a geographic

standpoint but that does not show the proportion of acreage in cotton. My figures are based on ginning reports for the entire county, regardless of where the cotton came from.

My graph shows the first pronounced peak in the production of cotton to be in 1926, and the price of cotton in 1927 rose to 20c a pound. Whether high market values for real estate would follow a peak production in 1926 with high prices in 1927, I cannot say.

The peak of the depression was in 1930. The year before, 1929, represented a peak of production with the fairly high price of 16.8c per pound for cotton. In 1930, production declined and the price was 9.5c per pound for cotton, which decline continued throughout the depression. There has now been a gradual recovery of cotton prices up to this date.

The population figures which I gave for the floodway area are figures prepared in typewriting by the Army Engineers of the Vicksburg office for their own information. I don't know whether it is a public document or not. We actually took a census of the people in there. I saw a large number of donators on the State land with little shacks all over that country. I actually saw these folks going in there and squatting on the land and clearing it—these homesteaders of tax forfeited lands.

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GILKARD H. MATHES, on behalf of defendant, testified:

I am 63 years old and at present am principal engineer in the office of the President of the Mississippi River Commission at Vicksburg. I was born and reared in Holland and was educated at the Massachusetts Institute of Technology. I have made hydraulic engineering my life's work, and have had vast experience. My first experience in hydraulic work was for the Commonwealth of Massachusetts, in 1896 in the Boston Harbor. Also worked on the survey of the Connecticut River in connection with flood control. In 1897, was appointed as a member of the United States Geological Survey, which was concerned with the measurement of the flow in the rivers in the United States. Worked on this for five years. In 1897 was detailed to make a study of Potomac River and its principal tributary, the Shenandoah. Made personal field investigations and wrote reports. In 1898 was sent to southwestern Colorado to make an investigation and survey of the San Juan and Mancos Rivers for the benefit of the Indian Service, locating reservoirs. Made a report which was published in the annual report of the Geological Survey of that year. In 1899 was sent to Arizona to start survey of a por-

tion of the Gila River in connection with the determining of the possibility of storing flood waters there. In 1900 was sent to northern Montana, at the direction of Secretary Walcott of the Geological Survey. Also made a survey and report for reservoirs project for river reclamation on the Big Sioux River in South Dakota. In 1902, after the passage of the Reclamation Act of 1902, was detailed to start the first survey and studies for the Grand River Irrigation Project in Colorado. In 1903 was appointed to make reclamation surveys in Oklahoma on the southern tributary of the Arkansas and Red Rivers. In 1906 and 1907 was employed by the Reclamation Service on the construction of the Carlsbad Dam on the Pecos River in New Mexico. In the fall of 1907 accepted employment with the Colorado Power Company at Denver until 1911. During the depression in 1929 I found it advisable to return into the Government service and was assigned to work in Virginia, where I met Col. Harley B. Ferguson, who became President of the Mississippi River Commission in 1932. After he moved to Vicksburg in 1932 I came to his office as principal engineer. Since 1932 my work has been identified with the development of the Mississippi River in its channel stabilization program called for in the Flood Control Act of May, 1928. I am conversant with that Act and House Document No. 90 referred to in the Act.

Work was undertaken on the comprehensive project outlined in House Document No. 90 in a progressive manner as rapidly as locations for various portions of the work could be laid out, rights-of-way obtained and funds were made available. Studies were carried on continuously with the prosecution of the work to accomplish the objects of the Act to the best possible advantage. These studies showed that as a result of the stabilization work done the safe flood carrying capacity of the leveed channel of the river had been greatly increased. Several methods were employed concurrently. These consisted first of eliminating bends and loops in the river which had become menaces to the levee and which required constant revetment for the protection of the levee by making cut-offs, thereby shortening the river. The first cut-off below Arkansas City is called Ashbrook cut-off which was opened November 19, 1935. The next one below is Tarpley cut-off opened April 21, 1935. Both of these cut-offs were constructed and opened after the plaintiff's suit was filed in August, 1934. The next cut-off below is Leland cut-off opened July 8, 1933. The next one below is Worthington cut-off opened December 25, 1933. The next one below is Sarah cut-off opened March 23, 1936. The next one is Willow cut-off opened April 8, 1934. The next one is Marshall cut-off



opened January 8, 1933. Skipping Yucatan, which the river made, the next artificial cut-off is Rodney cut-off opened February 29, 1936. The next one below is Giles cut-off opened May 25, 1933. The next one downstream is Glasscock cut-off opened March 26, 1933.

Witness was handed a map showing the alluvial valley of the Mississippi River from Helena below Natchez, which was published by the Mississippi River Commission, under the direction of the Secretary of War, which map the witness identified and which was offered and accepted in evidence and was marked Exhibit 55. This map had been revised to show the principal cut-offs which have been made in the river channel.

Mr. Williamson: "May it please the Court, plaintiff objects to any testimony by this witness as to the creating of cut-offs as the witness has defined them below the mouth of the Arkansas River or as to the effects of such cut-offs, because the cut-offs were not contemplated by the Flood Control Act of May 15, 1928. On the contrary, by House Document No. 90, of which the Court will take judicial notice, cut-offs were expressly condemned. Most of the cut-offs, and those in the proximity of Arkansas City which would affect the plaintiff's property, were made after the filing of the present lawsuit. Plaintiff's property, if taken at all by the United States, according to the plaintiff's contention, was taken January 10, 1929, or thereabout. The plaintiff was entitled to compensation under the provisions of the Fifth

Amendment of the Constitution of the United States 290 for the taking of her property at the time it was taken, and under the conditions which existed and were contemplated at the time of the taking. This suit should be tried just as though it were being tried immediately after the taking of plaintiff's property. We further submit to the Court that having once taken the plaintiff's property, no later change in the plans by the defendant, nor even the abandonment of those plans, could affect the right of the plaintiff to recover, nor the measure of her compensation. That was settled by one of the decisions where the United States filed a condemnation suit and then undertook to abandon the condemnation. It was held that the plaintiff was not interested in whether or not the United States ever used the easements which were actually taken as a result of the construction done under the Flood Control Act of May 15, 1928. Had changes been made that greatly intensified the damage to the plaintiff, that would be a matter of which she could not take the advantage. The rule works both ways. The

Government had the perfect right to use the floodway had circumstances made it necessary, and whether or not the Government exercised that right is immaterial. The amount of physical damage or destruction that might have resulted to plaintiff's property is wholly immaterial, because it would have been the result of a right for which plaintiff had been compensated by the Government at the time of the taking. This right to flow the land is an easement which we call in this case the "flowage rights". No changes made after the original taking could be competent, relevant or material, because the plaintiff was entitled to her compensation, if at all, immediately following the taking. The measure of damages is the difference between the market value of plaintiff's land immediately before the taking as compared with the market value immediately after the taking, and nothing 291 that occurred years later, not in the contemplation of either of the parties at the time of the taking, could possibly affect the market value of the lands immediately after the taking when those changed plans had never been dreamed of. These cut-offs were not in the contemplation of the parties when plaintiff's property was taken on approximately January 10, 1929. So we submit, may it please the Court, that these after thoughts by the United States in the nature of cut-offs, to which the attention of the witness is now being called, are incompetent, irrelevant and immaterial; and can throw no light upon the legal measure of damages which is measured by the difference in the market value of plaintiff's land immediately before and after the taking, which was approximately January 10, 1929. For these reasons the plaintiff objects."

Mr. Davis: "I would like to voice this additional objection. The introduction of any evidence of this kind cannot be defensive in this action in view of the pleadings in this case. The petition charges that there was a taking at a certain time caused by the adoption of the Act and the beginning of work on it. It has been ruled several times that there was a taking when those things were done. In several cases filed in the Court of Claims the decisions on the demurrers were to that effect. In the Kincaid case, the Court held that a cause of action was stated at law for damages, and not one for injunction. In this Court the late Judge Martineau, in passing upon a demurrer, said that the petition in this case stated a cause of action. The answer in this case denies the facts alleged in the petition. It is not pleaded as a defense that the Government has done anything, or developed any plan, that would reduce the damages, or that would do away

with the damages. Rightly the answer pleads no such thing as that, because it would not be admissible in the answer to plead that there has been a reduction in the damages, or that the damages have been done away with by some other plan that the Government has adopted."

Mr. Isgrig: "Now, it is our contention that the plan itself provides for channel stabilization. Now then, they filed a suit here saying that certain things will result because of carrying out of the program under the Flood Control Plan. And they say that their land was taken by the passage of the Act because certain things will happen. \* \* \* Now then, we say considering all of the things we have done under that plan and the things left undone, the result will not be what they say it will be."

The Court overruled the objection, and plaintiff saved her exceptions of record as to all evidence which might be introduced, from time to time, as to the making of cut-offs and the effect thereof.

Witness was shown and identified a map showing the stretch of the Mississippi River between the mouth of the Arkansas River and Old River where the Red River meets the Mississippi. This map was offered and accepted in evidence as Exhibit 57.

In addition to making these cut-offs, a certain amount of dredging was done in the reaches of the river between the cut-offs, and additional work in improving the channel as by closing auxiliary channels around islands and contracting the river wherever necessary by means of sand dikes, all as a part of the comprehensive plan of channel stabilization involving the entire reach of the river under discussion. The 11 artificial cut-offs mentioned, with the natural cut off at Yucatan Bend made by the river in the Fall of 1929, shortened the river a total of 100.6 miles in the total distance of 372 miles between the mouth of the Arkansas River and the mouth of Old River. One additional cut-off is now being opened at Caulk's Neck above Arkansas City.

Corrective dredging is a distinctly different operation from navigation dredging. It is aimed at enabling the river to scour its channel at points where it needs assistance. When a cut-off is made the water surface above the cut-off is materially lowered, especially at high water and this lowering extends upstream. At places where there are bars which resist scouring it is necessary to use dredges

and when resisting substances like clay and gravel have been ruptured or cut through, then the river is enabled to lower its bed at those points. That species of dredging has been (—) very important feature of the entire channel stabilization program. The cut-offs should be looked upon as the initial steps only. The dredging is necessary in order to complete the work, in order to enable the river to complete the work of lowering its channel. As a result of this work done to date a very material lowering of the water surface of the river has been accomplished.

We open a cut-off by dredging a narrow cut known as a pilot cut. The river flowing through the cut-off widens it and eventually makes it a new stretch of the river. That takes time. In stretches of the river between these various cut-offs dredging operations were undertaken known as corrective dredging. The cut-offs should be looked upon as initial steps only. The dredging is necessary in order to complete the work. When a cut-off is made the water surface above the cut-off is materially lowered, especially at high water. This lowering extends upstream depending upon the readiness with which the river scours its bed. As a result of the work done to date a very material lowering of the water surface of the river has been accomplished throughout the entire 372 miles so that today the river has an appreciably larger flood carrying capacity between levees. The greatest lowering of the surface of the river has been accomplished in the latitude of the fuse plug levee.

The dredging operations were aimed to make this lowering consistent and as nearly as possible uniform throughout and it has resulted in producing that very thing. As a result, today the river has an appreciably larger flood-carrying capacity between levees. Also the water surface at high water and also at other stages is now lower with respect to sea level than it formerly was. And to be specific with regard to the localities that this case is interested in, namely in the latitude of Arkansas City and the fuse plug, the lowering of the water surface of the river that has been accomplished has been the greatest in that particular locality. That statement is based on careful studies which I have made personally. It is my business to make with the aid of observations made on the river which are available in the official files of the Mississippi River Commission, which consists of the readings taken on gauges and other measurements on the river made before the cut-offs were commenced and since they were made.



Additional high water gauges were established, especially in the vicinity of the cut-offs in order to know the behavior of the river while undergoing improvement. \* \* \* The flow of the water was measured at points where this class of work has been done for many years, principally in the vicinity of Arkansas City.

By making these measurements of the discharge of the river it is determined for a given stage and by collecting figures of this kind comparisons can be made showing how the relation between stage and flow is changed. For instance, at Arkansas City the flow has been greatly increased for a given stage and over and above what it used to be before the Act was passed.

The lowering of the stage at Angola, Louisiana and Arkansas City are now the same, because the program of channel stabilization is still in process of being carried on and much still remains to be done.

Witness exhibited a hydrographic showing the different floods from 1900 up to the present time, which hydrographic was offered and accepted in evidence as Exhibit 58.

The improved channel capacity effected by the means described by the witness would effect all floods and create an additional carrying capacity. The greatest channel improvement has been made between Arkansas City and the fuse plug. The lands in that vicinity have received protection which is materially greater than it formerly was.

The floods which formerly were great enough to have gone over the fuse plug and overtopped it are now lowered to such an extent that they would not spill any water over the fuse plug.

The flood of February and March, 1937, would have exceeded the fuse plug levee if it had occurred ten years ago. It would have overtopped the fuse plug levee as it existed in 1928. This is a very definite thing, as shown by the observations made.

Every flood has its own characteristics. It would be futile to try to classify floods by any recognized grouping or type. There are no types of flood. No two floods are alike, and there are no two year's records alike. The improved channel capacity described has given greater protection than formerly to lands behind the fuse plug levee, because floods that have previously overtopped this levee would not do so now. The 1937 flood would have overtopped the fuse plug levee if this channel stabilization work had not been done.

Since the improvement became apparent as the result of the cut-offs and channel work mentioned, recommendations were submitted to Congress which in 1936, resulted in the passage of the Overton Act which authorized the construction of the Eudora Floodway in lieu of the Boeuf Floodway. From the location of the plaintiff's property on the map I am of the opinion that it enjoys greater protection today from the destructive flood waters of the Mississippi River than it did at the time of the passage of the Flood Control Act of May 15, 1928.

### Cross-Examination.

Section 131 of House Document 90 defines channel stabilization as being a bank-protection scheme which "will consist of revetting banks by proven methods and in addition to trying new and cheaper methods to accomplish the same result." "The same result" is holding the channel of the river stable. In my opinion the cut-offs were authorized by House Document No. 90 by the above statement in Section 131, and by Section 147 which recites: "the project to include the floodways, spillways, levees, channel stabilization, mapping, etc., hereinbefore recommended, with such modifications thereof as in the discretion of the Secretary of War and Chief of Engineers may be advisable." That would leave the door wide open to adopt any method such as cut-offs, or any other additional methods that might seem advisable. I do not believe it is necessary to find any other provision in House Document No. 90 to fall within the meaning of the

297 words just quoted as "hereinabove recommended." It is true that instead of stabilizing the channel of the river as we found it when the Flood Control Act of May 15, 1928, was passed we have actually shortened the river approximately 100 miles, throwing away 100 miles of very undesirable channel. There is no statement in House Document 90 that I know of authorizing that effect. The official maps of the Jadwin Plan as made by the Army Engineers interpreting the Flood Control Act of May 15, 1928, do not indicate that any of those loops in the river were intended to be cut. Those maps were made previous to 1932.

Immediately following the passage of the Flood Control Act of 1928, work was begun on the Jadwin Plan as one, unified, comprehensive project for the flood control of the alluvial valley of the Mississippi River, funds being available at the time; and the work has proceeded practically without cessation since that time.

I see nothing unusual in the fact that there have been three successive floods in the years 1934, 1935 and 1936, which would indicate that floods are increasing in the Mississippi River in their frequency and intensity. I do not know of any streams in the United States where floods have been increasing. The studies show [tha] floods are not increasing either in frequency or intensity. I am not in agreement with the statement that the 1937 flood out of the Ohio Valley was the largest flood in the recorded history of that valley. The 1936 flood exceeded all gauges predicted by the Mississippi River Commission and the Army Engineers so far as the measured height of water was concerned.

In my opinion, if there had been a synchronization or a conjunction of the flood crest out of the Arkansas and White Rivers like there was in 1927, with the crest of the Ohio flood in 1937, I think they could have been carried safely by the fuse plug levee. The facilities which the Corps of Engineers now have for flood fighting are such that that would not have been an impossible undertaking. I do not  
 298 mean that the fuse plug levee can probably be made to safely carry a flood of approximately 3,000,000 cubic second-feet of water. In 1927, approximately 1,200,000 cubic feet per second was the flow which the Arkansas and White Rivers brought down. Approximately 2,000,000 cubic second-feet of water came out of the Ohio River to the mouth of the White and Arkansas Rivers in 1937. The amount of water which the fuse plug levee can probably be made to safely carry is appreciably less than 3,000,000 cubic second-feet of water. The back-water reservoir area at the mouth of White and Arkansas Rivers is probably larger than 1,200 square miles. That reservoir area was completely full of water in 1927, at the crest of the flood. In 1937 the basins of the Arkansas River and White River were both very low. If this back-water emergency reservoir at the mouth of the White and Arkansas Rivers is very low when a flood comes down from the upper Mississippi River, it acts as a reservoir and absorbs a large part of the water of the flood flow, and holds it in storage until after the crest of the flood has passed, and then it drains out slowly. It is a very important factor of safety when a flood comes down the levee to have that storage empty.

I understand that the project flood contemplated a flow of 1,950,000 cubic second-feet below Arkansas City for which the levee grades were computed. Over 2,000,000 second-feet actually passed in 1937.

"Q. Then, in your opinion, under present conditions and designs, it is not necessary to have a fuse plug in the levee along the Mississippi River; and all the levees along the Mississippi River above and below could be the same height as the fuse plug; is that right?

"A. You have no right to make that change until Congress so authorizes."

"I do not say that the fuse plug levee is no longer necessary. According to the Act it is supposed to serve as an outlet for excess flood waters which the leveed channel could not carry, but so far in our discussion we have not got to a flood big enough that the levee cannot carry. I cannot see why such frantic preparations were made in 1937, by the United States Army, to evacuate the country below the mouth of the Arkansas River when there was not much water in the Arkansas and White Rivers and just one little flood coming out of the Ohio. I cannot answer why they got so excited about it.

If the fuse plug levee is left as it is, a potential floodway is still there with a possibility of its use every season under the present plan; but I should say its use is highly improbable. Its function is to be used any time sufficient flood water comes down the river.

The Flood Control Act of June 15, 1936, the Overton Act, authorizing the Markham Plan, leaves this fuse plug levee along the main channel of the river at the 1914 grade just as it is under the Jadwin Plan of the 1928 Act. It is not to be raised. The fuse plug is to be strengthened. The cross section is to be made stronger. The Act specifically calls for that. That is in order that it will not overtop before it reaches the designated stage of 60.5 feet. When the water reaches a stage of 60.5, the fuse plug levee is intended to be overtopped and to crevasse under either plan. The plaintiff's land is in the floodway under either plan, and it doesn't make any difference which is used, and would be by the same fuse plug levee.

Section 69 of Document 90 recites:

"Artificial or natural cut-offs shorten the reach where they occur and by increasing the slope and velocity produce a local lowering of the flood stage. However, the increased velocities immediately cause excessive bank caving either in the reach or near it, and the river eventually lengthens itself with new bends. The changes in the channel cause great damage and expense. The bank revetment now in use, expensive as it is, has not been subjected to and withstood such



velocities as would be caused by cut-offs. Low-water navigation in any stretch is likely to be temporarily destroyed by bars created by the excessive bank caving caused by a cut-off. The method is too uncertain and threatening to warrant adoption."

That was a statement made in 1928, before it was understood that this work could be done by the methods now in use. At the time this statement was made it was probably a true statement in the light of the knowledge of those 300 days. These cut-offs of which I have testified were not contemplated when the Flood Control Act of May 15, 1928, was passed. For approximately 50 years the policy of the Mississippi River Commission was as recited in Section 64 of Document 90. For about 50 years, instead of making cut-offs, the Mississippi River Commission built dikes in these loops in the river to prevent natural cut-offs because they thought they were dangerous. That policy was changed by the Army Engineers some time after February 28, 1931, when the Chief of Engineers transmitted to Congress a report, found in House Document No. 798, that a program of cut-offs does not appear feasible.

The Jadwin Plan as adopted by the Flood Control Act of 1928, has not yet been actually, physically changed. There has been no appropriation for the mere authorization of the Overton Bill. The plan of the Overton Bill (Markham Plan of the Act of June 15, 1936), cannot, by its own terms, become effective until flowage rights have been acquired within a definite limit and that has not yet been done. The only plan under actual construction is that authorized by the Flood Control Act of May 15, 1928. That is the actual, physical plan which is on the ground.

Section 118 of Document 90, adopted by the 1928 Act, provides:

"To insure that excess water will leave the main river, a fuse plug section of the levee in the vicinity of Cypress Creek must be kept at its present strength and at its present grade, viz. 3 feet below the new levee grade."

"This plan as described in Sections 117 and 118 of Document 90 has not been changed, but is still the plan at the present time.

Section 120 of Document 90 provides:

"The United States must have control over the Cypress Creek levee and keep it substantially at its present strength and present height."

The escape of flood waters through the Boeuf Basin is, and for a number of years has been, an essential feature of this Jadwin Plan which is in operation.

301 Section 71, Document 90, recites:

"It is advisable to adhere to the present policy of preserving the river generally in its present form and not to undertake a plan of flood control or of improvement for navigation that involves the formation of cut-offs."

The Army Engineers departed from that declared policy adopted by the 1928 Act some time after 1931.

The Chief Engineer's official report, dated February 28, 1931 (House Document No. 798, p. 6), states:

"Preliminary calculations indicate but little encouragement for flood control through rectification and enlargement in the reach between the Arkansas and the Red, the most inviting reach of the river for such operations. The apparent reduction in flood heights is small, and the cost of the operations for flood control results appears prohibitive."

I am not in a position to speak of that policy. The action of the Corps of Engineers and the Mississippi River Commission was in conformity with that policy until after 1931.

The report of the Chief of Engineers to the House of Representatives, dated February 12, 1935, Committee Document No. 1, on which the Overton Bill was based, filed many months after the present suit was filed, in Section 10, states:

"The course of the Mississippi River in the middle section is generally tortuous, especially through the Greenville Bends, a series of wide loops below the mouth of the Arkansas. With a view to increasing its flood discharge capacity, experimental work on a large scale has been undertaken in the rectification of the channel by cut-offs. This rectification through the Greenville Bends, by the forces of Nature or by design, may so lower the local flood heights that the fuse plug levees at the head of the Boeuf Floodway will carry more than the safe capacity of the river below them."

That statement may have been true at the time it was printed in 1935; but since that time the leveed channel of the Mississippi River below the fuse plug has gained very materially in discharge capacity. The gauge at Natchez in the 1937 flood was more than a foot higher than it has ever been before, but it also discharged more water with the cut-offs in operation.

The report of the Chief of Engineers dated February 12, 1935, paragraph 25, states:

302 "The Commission points out that the rectification of the Greenville Bends, which may be safely undertaken after the Eudora Floodway is completed, and the draw-down of that floodway, together with the gradual construction of reservoirs on Mississippi River tributaries, will substantially reduce flood heights in the section between the Arkansas and the Eudora Floodway."

I am inclined to agree with that conclusion.

As stated by General Markham, the Chief of Engineers, to the Congressional Committee in April, 1935, in my opinion as an engineer these cut-offs will not eliminate the necessity of the Eudora Floodway.

General Ferguson, President of the Mississippi River Commission, correctly stated in his testimony to the Congressional Committee in April, 1935:

"We have never claimed that they (the cut-offs), would do anything to floods at all."

The cut-offs were primarily a part of the river stabilization for the benefit of navigation.

Colonel Oliver, the District Engineer, correctly testified before the Congressional Committee in April, 1935, when considering the Overton Bill:

"And the people within the floodway itself are subject to flood right now, and they are not going to have their flood menace actually increased by the plan which we propose."

Chief of Engineers, General Markham, as late as January, 1936, many months after the plaintiff's suit was filed, after most of the cut-offs to which I have testified had been made, testifying before a Congressional Committee, stated:

"As to the contention of those who think that the lower valley can be protected within the levees of the main stem, I would state our conclusion that in order to take care of flood water there must be taken out of the river a million cubic feet per second."

At the time General Markham made that statement it was correct. The cut-offs, which were then mostly in existence have enlarged materially and lowered the river considerably since the day that statement was made.

I do not dispute the correctness of the statement of General Markham made last month, April 3, 1937, before the  
 303 Rivers and Harbors Committee in Washington, after all of the cut-offs were working, and after the 1937 flood, that still it is necessary to take one million cubic second-feet of water out of the Mississippi River to the west below the mouth of the Arkansas River. Nor with the statement of General Markham in January, 1936:

"I repeat that a million second-feet must be taken out of that river unless you are going to have more and more disaster. I repeat that if we are to get this river under control it is by this class of control, by building the levees, by the plan of taking out this water by means of spillways."

That is the general plan of flood control for the lower Mississippi Valley to keep the water at times of flood below a safe height on the levees, and to spill out the excess waters. The general location of plaintiff's property is now in one of these particular floodways, at the most critical point of the river just below the mouth of the Arkansas. Just how the water would flow down the floodway is another question which I am not prepared to answer. The plaintiff's property has been on the floor of that floodway, very near its head, since the passage of the Flood Control Act of May 15, 1928. The levees on the south bank of the Arkansas River have been made very, very substantial, and I do not anticipate any further flooding of plaintiff's property from a break in the Arkansas River levees.

I absolutely agree with the statement of General Markham in January, 1936, to the Congressional Committee that the cut-offs in the bends of the Mississippi River are not meant to be a substitute for the Eudora Floodway.

In January, 1936, General Ferguson, President of the Mississippi River Commission, stated to a Congressional Committee:

"Our figures now indicate that a flood such as occurred in 1927, would have to have water diverted somewhere below the mouth of the Arkansas River. At the present time no man can definitely foresee any avoidance of diverting waters below the mouth of the Arkansas."

Cut-offs are not safe as a substitute for a floodway such as the proposed Eudora Floodway. At the time these  
 304 statements were made in January, 1936, they were correct. While the channel of the river has been shortened about 100 miles between the mouth of the Arkansas River and the mouth of the Red River, the geographical distance



between those points—the flood channel, from the top of the levee on one side to the top of the levee on the other side—has of course not been shortened at all. The levee lines are the same.

Between the years 1776 and 1884, there were approximately 19 natural cut-offs in the alluvial valley of the Mississippi River which shortened the channel a distance of 228 miles, but in 1929, the river had regained its normal length to within 2.6 miles of its original length in 1776. It is a hydraulic law of rivers in alluvial valleys that they will maintain their length if left to function alone.

The cut-offs are planned to take advantage of this hydraulic law. Corrective dredging will maintain the channel.

The natural flood plane of the Mississippi River in the middle section is indicated by the green coloring on the official map introduced in evidence. The construction work done by the United States Government under the Flood Control Act of May 15, 1928, now prevents the Mississippi River from using that large natural flood plane area east of the river in the State of Mississippi.

In my testimony I have only given my own opinion, and have not spoken authoritatively for the Chief of Engineers, U. S. A., nor for the Mississippi River Commission.

#### Redirect Examination.

In my opinion the improved channel capacities to which I have testified will be maintained as long as the Corps of Engineers is on the job. Maintenance is necessary.

205 COLONEL LUNSFORD E. OLIVER, on behalf of defendant testified:

I have lived in Vicksburg, Mississippi, for approximately five years, and have been District Engineer of the United States Corps of Engineers since 1933. I graduated from the United States Military Academy in 1913, and have had various assignments of duty.

The levee on the South bank of the Arkansas River from Pine Bluff to Yancopin has been raised to the 1928 grade and section. From Yancopin down to Rohwer, a distance of about 19 miles, the levee has been left at the 1914 grade and section. From Rohwer down to Luna Landing, 32 miles, is the stretch of levee designated as a fuse plug levee under the Jadwin Plan, which is likewise at the 1914 grade and section. Immediately North of Arkansas City for about 8 miles up to

Lucca Landing, a set-back levee has now been likewise constructed to the 1914 grade and section. From Luna Landing at the lower end of the fuse plug levee as designated in the Jadwin Plan, to Vacluse, about 9 miles, the levee is likewise at the 1914 grade and section. From Vacluse to the Louisiana State line the levee has been raised to the 1928 grade and section. Nothing has been done with reference to the construction of the proposed guide line levees in the Boeuf Floodway under the Jadwin Plan.

It is very readily seen or verified that Congress did not enact into law by any means all of the recommendations of General Jadwin. General Jadwin recommended that the United States should not begin work on this project until the state had assumed the liability to pay the local people whatever might be necessary to acquire their right to raise the levee and protect themselves. But the Congress did not enact the recommendations of his into law. General Jadwin wanted us to obtain control of the fuse plug levee but congress did not do anything about the acquiring by us of control of the fuse plug levee. It has always, that has always been the understanding of the War Department.

306 Quoting from Committee Document No. 2, 71st Congress, first session, James R. Good then Secretary of War, wrote to the Attorney General: "It is realized that the flood control project has a weak spot with reference to flood control in that there is no law preventing local interests from raising the so-called fuse plug levee at the heads of the Atchafalaya and Boeuf basins. These interests have not been deprived by the United States of protecting themselves and they can do so insofar as the United States has any jurisdiction. However, it is felt that the states so greatly benefitted by the flood control project and so dependent for protection upon its scheme of water control, can if they so desire, make laws prohibiting the raising of the fuse plug levees and can settle with the land owners for any rights taken from them."

If the local interests desire to go upon what is commonly called the fuse plug levee and raise it to an elevation of six feet, eight feet or any other height, is there any power or will the engineering forces claim any power, right or authority to prevent them from doing this very thing. There is nothing can prevent them from doing so.

It has always been the understanding of the War Department that we have no right under the Jadwin Plan to prohibit the local people from raising the fuse plug levee if they so desire.

When the last high water of 1937 was impending, under instructions we made preparations for raising and strengthening those sections of the levee which were low, with instructions not to permit any levee in the District to be overtopped or breached if we could prevent it. We would have carried on this fight beyond the 1914 grade, and would have welcomed help from the local people.

It was quite noticeable that the people on the Mississippi side of the river were worse scared during the 1937 flood than were people on the Arkansas and Louisiana sides.

#### Cross-Examination.

I have seen local interests at work on that fuse plug levee a few miles North of Arkansas City, but cannot tell whether it had sunk below the existing grade as prescribed by the Flood Control Act of May 15, 1928. I wouldn't say that local interests have ever raised the fuse plug levee anywhere above the 1914 grade and section. The fuse plug levee has been left at, and still is at, the 1914 grade and section.

When the 1937 flood was coming I told the people in Arkansas and Louisiana that there was no danger whatsoever South of the Arkansas River because of the emptiness of the reservoir area back up the Arkansas and White Rivers. Therefore, the 1937 flood did not endanger the fuse-plug levee at all.

#### Redirect Examination.


By 1914 grade and section is meant that prior to the 1927 flood the Mississippi River Commission had established levee grades up and down the Mississippi River to which they proposed to build all the levees eventually. The levees had partially been built to that grade when the 1927 flood came. That grade was called the 1914 grade and section. In the 1928 Act authority was given for raising the levees to a new grade and to a greater cross section, and the levee grades and cross sections established under authority of the 1928 Act are referred to as the 1928 grade and section established by the Mississippi River Commission.

308. GEORGE A. MORRIS, on behalf of defendant, testified:

I have been employed as an engineer in the United States Department of Engineering at Vicksburg since 1929, having received a degree in engineering at the University of Alabama in 1928. In 1935 I supervised the work of the Discharge Section which has to do with the measurement of the flow of the Mississippi River. Since 1926 I have had respon-

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sibility for field and office investigations in the hydrographic surveying of the river to determine the flood flow characteristics.

I exhibit a profile of the fuse plug levee which shows the flow lines of the Mississippi River during the 1927 and 1929 and 1937 floods for comparative purposes. Witness exhibited a profile which officially recorded the water surface elevation and other information along the Mississippi River, which was offered and accepted in evidence as Exhibit 59. When the 1937 flood reached its crest, the fuse plug levee still had 4 feet of free board above water at its lowest point. In the vicinity of Yancopin 5 feet of levee were above water. The profile indicates that the fuse plug levee would first have been overtopped below Luna Landing, about 25 miles below Arkansas City. Witness produced a graph showing the relationship between stage and river discharge for the period of 1929, which was offered and accepted in evidence as Exhibit 60.

We have carefully plotted the water discharges of the Mississippi River along the fuse plug levee during the high waters of 1929, 1933, 1935 and 1937. The crest discharge in 1937 was 2,150,000 cubic feet per second. In 1935 it was 1,440,000 cubic feet per second. In 1933 it was 1,338,000 cubic feet per second. In 1929 it was 1,788,000 cubic feet per second. In 1929 the stage of the river on the Arkansas City gage at the crest of the discharge of 1,788,000 cubic feet per second of water was 58.8 feet. In 1937, when the crest was discharging 2,150,000 cubic feet per second, the gage at Arkansas City was 53.8 feet. In other words, in 1937 there was 362,000 cubic second feet greater flow than in 1929, and it passed 309 down the river at a stage 5 feet lower. In 1937 a 207 greater flood peak passed the Arkansas City gage than in 1929. The carrying capacity of the river at this point had been increased. At the time the 1929 peak discharge was passing down the river in 1937 the stage was about 10 feet lower.

The levee on the south bank of the Arkansas River has been built up to the 1928 grade and section authorized by the Flood Control Act of May 15, 1928, repairing the crevasses in the levee made during the 1927 flood. Witness produced profile known as a level profile of the south bank of the Arkansas River, and which was offered and received in evidence as Exhibit 63. Witness stated that at any particular point a direct comparison may be drawn between the profiles as they were actually observed or the levee tops as they actually were in 1927 or 1935. The location of the three crevasses is likewise shown on this profile, Medford at this point level of

1927, Pendleton and South Bend further upstream. Had this not been done, the 1935 high waters in the Arkansas River would have overflowed the same area that was overflowed in 1927, including the plaintiff's land.

By a comparison of aerial photographs taken in 1930 and 1936, we find there has been an increase of cultivation in the area covered by the Boeuf Floodway of 3.6%, with an increase of 2.5% of the area in the Boeuf Basin not in the floodway. The area not in the alluvial valley, or overflow district, for the period shows an increase of .2% in acreage. In the area in the Boeuf Basin not in the floodway there was a decrease of .6%. In other words, the percent of increase in cultivated lands in the floodway area is somewhat higher than in the area contiguous to Pine Bluff which would not be subject to overflow from crevasses in the Mississippi River.

A comparison of photostats of the area immediately  
310 around Arkansas City, including plaintiff's property, about 6 miles square, indicates an increased area of cultivated land between 1930 and 1936 of 5.87%; a decrease in brush and weeds of 1%; and a decrease of woods land of 4.08%. There was a greater amount of clearing in the vicinity of plaintiff's property than elsewhere in the Boeuf Basin.

#### Cross-Examination.

Cubic feet per second is the number of cubic feet of water passing a certain point in a second. During the 1927 flood it would take about 70,775 cubic feet per second to raise the gage at Arkansas City one foot.

The crest of the 1936 flood was 52.8 at Cairo on April 16, 1936. The crest of the same flood at Arkansas City was 41.3 feet. Therefore, in the 1936 flood the crest at Arkansas City was 11.5 feet lower than the crest at Cairo. During the 1937 flood, the crest at Cairo was 59.62 and at Arkansas City 53.86, or a difference of only 5.76 feet. The first cut-off below Arkansas City, Ashbrook cut-off, was opened November 14, 1935, but was not as effective in 1936 as in 1937. The Ashbrook cut-off south of Arkansas City was opened during April, 1936. It was opened November 14, 1935. In April, 1936, it had become defective to a very marked degree. Yet in 1936 the stage at Arkansas City was 11.5 feet lower than the Cairo gage, while in 1937 the difference was only 5.76 feet. So in 1937 the gage at Arkansas City lacked approximately 6 feet of being as much lower than the Cairo gage as it was in 1936.

In 1892 the records show a maximum discharge of 1,742,000 cubic feet per second at Arkansas City at a gage of 48.01.

At the same gage of 48.01 at Arkansas City on February 1, 1937, the discharge was 1,826,000 cubic feet per second. There were no cut-offs below Arkansas City in 1892. The 1937 discharge at the 48.01 gage was 84,000 cubic feet per second more than at the same stage in 1892, representing a 311 difference in gage of only slightly more than one foot taking 70,775 cubic feet per second to represent one foot on the gage.

In 1912, before any cut-offs were constructed, approximately 2,700,000 cubic feet per second of water was discharged down the Mississippi River at Arkansas City at a gage of 55 feet. In 1937 only 2,150,000 cubic second feet passed.

In 1890 at a gage of 48.8 at Arkansas City the discharge was 1,418,000 cubic second feet; and in 1892, two years 312 later when no cut-offs had intervened, at approximately the same gage at Arkansas City of 48.1, the total discharge was 1,742,000 cubic feet per second, a difference of 324,000 cubic feet per second greater in 1892 than in 1890, when there were no cut-offs to explain the difference.

In 1903, at a gage of 50.4 feet at Arkansas City, 67,000 cubic feet per second more water passed than in 1893 at approximately the same gage of 50 feet.

At a gage of 55 feet at Arkansas City the discharge in 1913 was 281,000 cubic feet per second less than the discharge at the same gage in 1912.

At a gage of 48.1 feet at Arkansas City on May 4, 1892, there was a discharge of 1,742,000 cubic second feet, and ten days later, with an increase of one foot on the gage at 49.1 feet, the discharge was 1,410,000 cubic second feet, or 322,000 cubic feet per second less.

In the same flood of 1892 between the stages of 48.3 and 48.1, just .2 of a foot difference in stages, the difference in the volumes of water discharge was 382,000 cubic feet per second.

On January 30, 1937, at a stage of 46.1 the discharge at Arkansas City was 1,753,000 cubic feet per second; whereas on March 4, 1937, in the same flood, at a gage of 45.9, or only .2 of a foot difference, the discharge was 1,390,000 cubic feet per second, or a difference of 313,000 cubic feet per second on a change of .2 of a foot on the gage.

In 1907, before there were any cut-offs, at a stage of 51.8 on the Arkansas City gage the discharge was 1,529,000 cubic

feet per second, whereas in 1935 at a gage of 51.7 feet the discharge was 1,386,000 cubic feet per second, or 143,000 cubic feet per second less discharge in 1935 than in 1907. The Leland cut-off below Arkansas City was in operation in 1935.

CAPTAIN J. S. SEYBOLD, on behalf of defendant, testified:

I graduated from the United States Military Academy in 1920, took degrees in civil engineering, have had various assignments of duty, reported to the Vicksburg Engineering District in 1934, and since March 1, 1935, have been in charge of the General Engineering Division. In the performance of my duty I supervise the collection of data concerning high-water profiles, river flows, river capacities, existing levee grades, gage records, and other engineering and hydraulic information. I am familiar with the data and exhibits presented by Mr. Morris, prepared under my supervision.

This data and these exhibits reflect that in the 1937 flood at the crest 362,000 cubic feet per second more water passed than at the crest of the 1929 flood, approximately 25% greater flow, at a 5 foot lower gage. The 1937 flood crest was below the 1914 grade line of the fuse plug levee by a minimum of 4 feet. At Arkansas City there was approximately 6 feet of free board at the crest of the 1937 flood. In 1937 a flood would first have overtopped the fuse plug levee at Vaulchuse or Luna Landing where there was the minimum free board.

I am familiar with the provisions of the Flood Control Act of June 15, 1936, which amended the Flood Control Act of May 15, 1928. This revision of plans for the floodway in the middle section was considered desirable for three reasons. One was to minimize the area subject to overflow. Second, to assure positive operation of a floodway, and third to take advantage of the increased channel capacity of the river obtained by operation of the channel stabilization program of the 1928 Act. Witness reads into the record Flood Control Act of June 15, 1936, commonly referred to as the Overton Act—Public No. 678, 74th Congress, Senate Bill 3531, and describes the Markham Plan authorized by the 1936 Act. Our surveying parties are now in the field surveying and working on the data for the authorized modifications. At the present time they are trying to obtain options on the land in the Northern extensions. If the options



are obtained in accordance with the provisions of the Act, and if funds were available, the Plan would go under construction under the approval of the Mississippi River Commission. There will be difficult drainage questions to be solved and economic studies must be made and planned to balance the cost of the land against the height of the levee. The designing and engineering features require a considerable length of time. We are going ahead as rapidly as our funds permit. We have abandoned the Boeuf Spillway. The witness produced a map showing the general features of the Overton Plan in the Middle Sections. This was offered and accepted in evidence and filed as Exhibit 68.

#### Cross-Examination.

The provisions of Section 2 of the Overton Bill that expressly provides that the Boeuf Floodway "shall be abandoned as soon as the Eudora Floodway \* \* \* is in operative condition and the back-protection levee \* \* \* extending North from the head of the Eudora Floodway, shall have been constructed" is a question of law. We are doing no more construction work toward completing the Boeuf Floodway. That means we have abandoned it. The protection given the land in the Boeuf Basin is the same as it has always been except it has been materially increased. In my opinion there is no Boeuf Floodway. My interpretation of Section 2 of the Overton Bill (Flood Control Act of June 15, 1936) is the Boeuf Floodway plan will still be in operation.

Under the provisions of the Flood Control Act of June 15, 1936, that stretch of low levee at the head of the Boeuf Floodway, designated as a fuse plug, is to continue just as it has been left since 1928. There is no change to that section of the levee in the new law. It is left at the 1914 grade.

There has been no preparation to carry out the construction authorized by the Overton Bill. Very few flowage rights required by the Overton Bill have been acquired so far. The Markham Plan, authorized by the Overton Bill, so far is nothing but a paper plan, an optional plan. I cannot say whether or not it will ever be executed. Even the details of the plan have not yet been worked out, much less approved by the higher authorities. We have not yet decided where would be the most effective place to put the intake into the upper floodway with reference to Arkansas City from the standpoint of controlling the floods of the Mississippi River.

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GEORGE R. CLEMENS, on behalf of defendant, testified:

I live in Vicksburg, Mississippi, where I have been senior hydraulic engineer for the Mississippi River Commission since 1931. I received a degree in engineering from the University of Michigan in 1921, since which time I have specialized in hydraulics and have continually practiced by profession. I spend about one-half of my time actually on the river and keep intimately informed as to the results accomplished by river activities. I personally observed the 1937 flood fight from Cairo downstream, and made several official inspection trips to the New Madrid Floodway to observe the crevasses and the effect of flood in the floodway area. A number of my articles on flood control of the Mississippi River have been published.

316 The term flood means water in excess of the bankfull capacity of a natural stream. When the river flow reaches the stage where it spills over the banks a flood exists however small the area. No two floods are alike. Even floods of the same rate of flow may differ in gage height because of different channel conditions. It is possible to improve the river channel and cause more water to be carried at the same height on the levees. I have thoroughly covered the alluvial valley of the Mississippi and am familiar with its characteristics, and the history and development of its levee system. Before men entered the valley the entire alluvial plane was subject to overflow. As the first settlers came into the valley they began to protect various portions of that plane beginning with the small levees in the vicinity of New Orleans in 1717. As the development of this alluvial valley increased, levees and other means of protection were established for various portions of the valley. It was not possible to protect the entire alluvial valley, or even to protect those portions which were protected from all floods. The plan of protection in the early days developed in a hit and miss fashion, protecting as much area as means and money permitted. In 1882 the Mississippi River Commission was formed and from that time on assisted in studies of the river system. Later the Commission assisted financially the local interests, increasing the size of the flood that was held out from the natural overflow areas. All areas were never protected. By 1927 a fairly complete system of levees had been built along the Mississippi River, but the great flood of 1927 broke these levees and overflowed the land. Local communities felt they had reached the limits of their resources and the job was too great for them. The construction of the main protection features were then taken over by the United States

Government by the Flood Control Act of May 15, 1928, the Government building levees to protect as much land as was practicable in the valley from as high a flood as they considered it possible. Certain new features were embodied in this plan. Different areas have different degrees of protection.

A very large area or acreage between the levee lines and in the back-water areas at the mouths of the various tributaries of the Mississippi River have no flood protection whatever under the Jadwin Plan, as is shown by the maps.

The Mississippi River Commission assisted financially in the local interests' construction activities in adding to the areas of protection and increasing the size of the flood that was held out from the natural overflow areas. There were certain areas that were not protected and they were only protected from certain floods.

The people in the Arkansas and White River back-water areas and within the general bounds of those areas which I have described above have no flood protection. The people living near Mozart and lands located nearby are overflowed by a relatively small flood that comes down the Arkansas River. The area near Indian Bay or Turner requires a somewhat larger flood to overflow it but these areas are flooded at the expense of the area within the Boeuf Basin and within the so-called Boeuf Basin floodway.

Our work of stabilization under the Jadwin Plan has lowered the flood height throughout the reach of the Mississippi River from the Arkansas River to below Vicksburg, affording a quicker run-off of water and thus protecting much land in many floods that would otherwise be overflowed. In 1929 a natural cut-off occurred at Yucatan Bend and the effects were carefully observed. Later in 1932 additional studies were made and the program for making artificial cut-offs was initiated. The first cut-off begun was that at Diamond Point in the fall of 1932, and the work of making cut-offs has continued to the present time. Eleven cut-offs have been completed shortening the river approximately 100 miles. After a cut-off is opened it requires some time and high stages of the river to properly develop it. We are dredging the river within the reach through which we have cut-offs, and constantly watch the cut-offs. The major tests of the efficiency of the cut-offs occurred in the 1937 flood which demonstrated there had been a progressive lowering of the flood height of the river as a result of the cut-offs. The 1937 flood was the greatest confined flood that was ever

held by the Mississippi River levees. The 1937 flood had a discharge at Arkansas City of approximately 360,000 cubic feet per second more than the 1929 flood, but was carried at a stage of 5 feet lower. The free board of the levee at Lucca Landing or Possum Fork, above Arkansas City, during the crest of the 1937 flood was 5 feet, but at Vacluse, below Arkansas City, it was slightly less than 4 feet. From this  
 319 I would say that the levee would first have overtopped during the 1937 flood in the vicinity of Vacluse, approximately 35 miles below Lucca Landing or Possum Fork, approximately 25 miles below the plaintiff's property.

From my observation of crevasses I would say that sanding of property does not extend over two miles from the crevasse. Timbered area reduces the velocity of flow and sand is dropped when the velocity decreases. If the fuse plug levee should overtop or crevasse near Vacluse, some 25 or 30 miles from the plaintiff's property, most of the water would flow downstream and there would probably not be sufficient backwater to reach the plaintiff's property. I do not think the bottle-neck above Arkansas City endangers the fuse plug levee in that area. In the 1937 flood the levee at the bottle-neck had more free board than the levee below the bottle-neck at Luna Landing. In the 1937 flood the levee at the head of New Madrid Floodway overtopped first about 12 miles below the bottle-neck in that vicinity, rather than above the bottle-neck where we wanted it to. I don't think the bottle-neck has any bearing on the point of where the fuse plug levee will first overtop or breach.

320 The 1927 flood has been estimated at a confined crest flow of approximately 2,460,000 second-feet. The 1937 flood was 2,150,000 second-feet, or 300,000 second-feet less than in 1927, and passed Arkansas City with a freeboard of 6 feet and a freeboard of 4 feet at Luna. Therefore I would say a flood 25% less than the 1927 flood could now be safely passed by the fuse plug levee. I am of the opinion that the floods of 1912, 1913 and 1916, all of which overflowed plaintiff's property, can now be safely carried in the river without overtopping the present levee system between the Arkansas River and the Red River. With a proper high water fight, I believe the 1927 flood could be carried by the fuse plug levee section now. I am not certain, but they would have a reasonable chance. In my opinion, the protection of the plaintiff's property has been materially increased since the passage of the 1928 Act.



## Cross-Examination.

I would not have the Court understand from my testimony that I recommend the building up of the fuse plug levee to the 1928 grade and section. After the Eudora Floodway has been completed I see no objection to building the fuse plug levee at the head of the Boeuf Basin to the 1914 grade and 1928 section as provided by Section 10 of the Flood Control Act of June 15, 1936, the Markham Plan. I have not undertaken to speak authoritatively for either the Chief of Engineers or the Mississippi River Commission, but have given my own personal views gained from my own experience with the river.

Caulk's Neck cut-off east of Lucca Landing and the fuse plug levee, has been opened since this trial began. When fully developed it will eventually be approximately the same width as the average width of the river through that stretch. During the period of development, and during high water, the velocity of water through this cut-off will be high. The upper, intake end of the cut-off is approximately 8 feet higher than the lower, discharge end, resulting in a swift  
 321 current through the cut-off during the period of its development. Swift velocities may work on the bed of the stream as well as on the banks. I do not at the present time agree with the statement in House Document 90 by the Chief of Engineers that the increased velocities caused by cut-offs are dangerous in that they cause caving banks.

I was in charge of the Cairo office when on Saturday night, January 24, 1937, the Army Engineers dynamited and blew out the fuse plug levee at the head of the New Madrid Floodway for the purpose of protecting the inhabitants of Cairo. We had purchased the right to overflow that floodway when necessary, and that was a part of the flood fight. For days we had been trying to get some people out of the floodway. We were using the New Madrid Floodway as it was intended to be used by the Jadwin Plan and were trying to protect the other levees from overtopping on the people of the Mississippi Valley.

The low section of the fuse plug levee in the neighborhood of Vacluse during the 1937 flood was a comparatively short section of the levee that could have been protected by topping within a comparatively short time. I do not know whether or not it was left that way for the purpose of this lawsuit. That levee at Vacluse under the Jadwin Plan would eventually be raised to the 1928 grade, and there is no doubt of the authority of the Army Engineers to raise that

low section of the levee 3 feet higher than the fuse plug levee to the north. If the levee should break at Vaucluse then it would not be functioning as intended by the Jadwin Plan.

When the crest of the 1937 flood reached the mouths of the Arkansas and White Rivers the discharge from those rivers was 100,000 cubic feet as compared with 1,200,000 cubic feet in 1927.

322 The Bonnet Carre Floodway, as well as the Birds Point-New Madrid Floodway, functioned during the 1937 flood substantially as those two floodways were designed to function under the Flood Control Act of May 15, 1928.

In establishing grade lines for levees, the Mississippi River Commission undertakes to follow the slope of the river in order that the freeboard of the levee, which is the portion of the levee above the surface of the water, will be approximately uniform throughout the river. During the 1937 flood this freeboard varied from less than nothing at Cairo, where the water went above the top of the levee, to more than 11 feet of freeboard at some places in the lower river.

Referring to the 1937 flood as a "flash flood" is the layman's term. Every flood is unusual. It is unusual in its manner of development and behavior. We have made all characters of observations on the cut-offs since they were started in 1932. I have studied the records of the natural cut-offs in the Mississippi River for the preceding 150 year period during which the Army Engineers were preventing cut-offs as being dangerous rather than making them artificially. General Jadwin was Chief of the Army Engineers when he was of the opinion that cut-offs were dangerous when the Flood Control Act of May 15, 1928, was passed.

A number of elements cause levees to crevasse, such as a steamboat running into the levee line, crayfish holes in the levee, slides and sluffing on account of the texture of levees, seepage, faulty foundations, wave wash, overtopping, et cetera.

It was not intended by the Jadwin Plan to protect the land between the levee lines, nor the back-water areas at the mouths of the Red, Yazoo, White, Arkansas and St. Francis Rivers, which have always been subject to overflow. The overtopping of the fuse plug levee would reduce the back-water area at the mouths of the White and Arkansas Rivers, a part of which has been converted into a game refuge  
323 by the United States Government. These areas are all arms of the so-called natural storage basin of the

river. In designing the Jadwin Plan the effectiveness of these reservoir areas were taken into consideration. Plaintiff's property is not in any of these back-water areas shown on the map.

The two cut-offs nearest plaintiff's property, Tarpley Neck, a short distance above Greenville, and Ashbrook Neck, below Arkansas City, were both cut since the present lawsuit was filed in August, 1934, as also were the cut-offs at Sarah and Rodney.

The following statements relative to the 1937 flood and the cut-offs, taken from a paper which I read at a meeting of technical engineers about 30 days ago, are correct:

"Fortunately for the lower valley the upper Mississippi was relatively low. . . . In June, 1932, Brigadier General Harley B. Ferguson was detailed as President of the Mississippi River Commission. A study of revetments indicates that in some cases at least they actually reduce the flood carrying capacity of the river by decreasing the river cross-section at bank-full stage. Levees admittedly raise stages by confining the flow to a part of the former flood channel. Dikes on necks have been built to prevent flow across the neck, holding up the water at the upper side of the neck and preventing its unobstructed downhill flow. I don't know why these dikes were built before the year 1932. This work of levee and channel improvement cannot be laid out in detail in advance, but must follow the river's movements. The river is a live, moving, changing thing, and should be treated as a live patient. On Sunday, January 24, the situation was rapidly becoming acute and orders were issued to open holes in the fuse plug levee at the upper end of the New Madrid Floodway, permitting the overflow in that area as soon as possible. During the night a dynamiting expedition was organized under the direction of Major Burdick to accomplish this. Three large crevasses were opened in the fuse plug levee using a total of approximately 10 tons of dynamite to open approximately 1,000 feet of crevasses. The New Madrid Floodway functioned essentially as planned and protected not only Cairo but the entire St. Francis Basin from a flood that would have overtopped the levees as they stood in 1927. About 500,000 cubic feet per second was carried in the floodway. Below Tiptonville the flood began to feel the straight jacket of Old Man River being confined by the levees. It continued to roar and rail, working its vengeance on some protected places. Another factor that helped the flood fight on the lower river floodway was the relatively good behavior of the White and Arkansas. They

were relatively low. They had a less flood wave than they had in 1927. There was an early flood on the White but it was largely out of the way, helped by the improved channel, before the main flood reached Arkansas City. One of the questions most frequently asked regarding the 1937 flood is, what was the effect of the cut-offs and channel improvement work? The complete answer is far too complicated to give in a few words, and many of the details will not be known for some time. The flood fight from Arkansas City to 324 Vicksburg was a very tame affair. There was never any danger. Below the Arkansas River the 1937 flood lacked almost one-third of reaching the crest flow provided for by the Jadwin or Markham Plan. It is surprising that there should have been so much hysteria as the flood approached the lower Mississippi Valley."

General Harley B. Ferguson, then just appointed to the Mississippi River Commission, initiated the program of channel stabilization by cut-offs in June, 1932. The program involves cut-offs plus dredging between the cut-offs and maintaining the improved channel. Three years ago a bold attack on the historic problem of controlling the Mississippi River was begun on a radically new line. Long standing tradition asserted that the river's wild course must not be changed, and its countless bends must be held at all hazards. Accordingly millions of dollars were spent on dikes to prevent the breaking of narrow necks, and on revetments to armor caving banks against further erosion. In the new attack this tradition was discarded and cut-offs were made across a number of bends. A number of years will be required to determine the full value of the cuts to navigation. Any conclusions at this time, (February 20, 1936), as to the ultimate effect of the cut-offs on the Mississippi River would be premature. I am 37 years old. The statement made by the witness above read and incorporated and a statement written by him on the 1937 flood, was made in February, 1936 and at that time they had not had the 1937 flood. At the present time they have a great deal more information and know what the cut-offs will do in a deep flood and at the time of the article they had not had the peak big flood.

Here the defendant rested.

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E. B. WHITTAKER, in rebuttal for plaintiff, testified:

I live in Little Rock, Arkansas and am in charge of buying land in this State by the Resettlement Administration of the United States Government.



Neither Mr. Frank Masters of Lake Village, Arkansas, nor anyone else was authorized to offer the owners of the Macon Lake plantation \$37.50 an acre for their land on behalf of the Resettlement Administration. As a matter of fact, the Macon Lake plantation is in the Boeuf Floodway as created by the Flood Control Act of May 15, 1928, and it is the policy of the Resettlement Administration in Arkansas, not to consider the purchase of any land in that floodway under the Jadwin Plan. We did not believe we would be safe in placing some farmers in that area. We will not buy land unless it is in a protected area, if we know it.

#### Cross-Examination.

We did buy some land that was overflowed from the Arkansas River in 1927. We do investigate and consider the tax structure which has some influence on our land purchases. We try to buy land where, considering all the conditions, the chances of success will be greatest.

When we considered the flood menace to land within the Boeuf Floodway created by the Jadwin Plan, that was enough to eliminate the land within that floodway from further consideration by us.

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E. B. HARRIS, in rebuttal for plaintiff, testified:

I live in St. Louis, Missouri, where I have been Assistant Secretary of the Federal Land Bank of St. Louis for the last 15 years. When the creation of the Boeuf Floodway in Southeast Arkansas by the Flood Control Act of May 15, 1928, was brought to the attention of the Federal Land Bank of St. Louis, we made certain investigations as to the security values of real property lying on the floor of that floodway, and decided, due to the flood hazard, we could not make loans in that area. The Federal Land Bank adopted the policy of declining to make land bank loans on the property located in the Boeuf Floodway the first part of 1929. That policy has been continued until this time.

As to the records of loans in the general vicinity of the floodway in Southeast Arkansas, made since the Flood Control Act of May 15, 1928, there were a few obligations we had already approved during 1928, that were closed thereafter. Also some mortgages appearing on the record were sales made by the Federal Land Bank of farms we own, to secure the purchase price of which we took back a mortgage on the land. The Land Bank Commis-

sioner, not the Federal Land Bank, made some loans in that area.

According to my records of the loans which were pending when the Flood Control Act of May 15, 1928, was passed, and completed thereafter, only three were in Chicot County and none in Desha County. Of the mortgages taken to secure purchase money for sales made by the Federal Land Bank, two were in Chicot County and one in Desha County. All other mortgages of record to the Federal Land Bank of St. Louis represent loans that we understood were not in the Boeuf Floodway.

The Federal Land Bank loans money which it secures from the sale of bonds to general investors, and we have to protect the bondholders. The Commisisoner's loans are made under a special Act of Congress and are more or less Government money for which we are not quite so strict as to the security required on the Land Bank loans. The Commissioner's loans are for shorter periods of time and certain chances can be taken on them. The Federal Land Bank had quite a number of loans in that general area before the passage of the Flood Control Act of May 15, 1928. Our records show we have foreclosed all our loans in Desha County.

The only loan in the vicinity of plaintiff's property was the Lacey loan on a farm of 240 acres located three-fourths of a mile from the plaintiff's land. We loaned \$3,400 on that Lacey farm in 1920. After foreclosing the mortgage, we resold this farm on the open market in October, 1931, for \$750.

#### Cross-Examination.

In making its loans the Federal Land Bank also considers the tax burdens and drainage problems, and stays out of territory where the tax burden is excessive. We have refused loans in territories outside of the Boeuf Basin because of excessive tax burdens. The main reason we stayed out of the Boeuf Floodway area was due to the Flood menace. For that reason we decided we could not make loans in that  
328 basin and the other factors were not taken into consideration.

In Chicot County we have a total of 96 Federal Land Bank loans in the entire county. Only 5 of these loans made since 1928, were in what we considered the floodway, and these were loans which we took back for the purchase price of land we sold, and 3 of them were loans which were pending at the time the Act was passed. I do not have any personal knowledge of the list of mortgages in that area which you pre-

sent to me. The bank has about 87,000 loans in force. I have with me only memoranda as to our records of the loans that we made in the Boeuf Floodway, and cannot now testify as to mortgages outside of that territory. I can verify the records on my return to St. Louis if you desire.

### Recross Examination.

I was asked to bring with me only the records of the loans held by the Federal Land Bank in the Boeuf Floodway in Desha and Chicot Counties. If the records show other loans have been made in these two counties of which I do not have the records with me it is because the Federal Land Bank understands such loans are not in the Boeuf Floodway. If a large part of land is outside of the floodway, a sufficient amount of itself to justify the loan in the judgment of the bank, we would make the loan even though some of the land might be over in the actual floodway. I would not mark such loans as being in the floodway. My testimony is based upon careful search of our records made on three different occasions.

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J. I. KELLY, in rebuttal for plaintiff, testified:

I have lived at Halley in Desha County, Arkansas, 32 years, during which time I have been familiar with the land values of that county. On June 22, 1926, I sold 80 acres of land two miles east of Halley, not on any improved highway, of which about 68 acres was in woodland and 12 acres 329 was in cultivation, for \$2,500, or more than \$31 per acre, as shown by this certified copy of the Deed. In May, 1925, W. I. Best sold 80 acres in that community, of which 45 acres was in woodland and 35 acres in cultivation, for \$3,600, or approximately \$45 an acre. These represented fair market values in that community until it was learned in 1929, that these lands were subject to flooding as the result of the Jadwin Plan.

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MRS. EUGA M. SNYDER, in rebuttal for plaintiff, testified:

I have lived in Desha County, Arkansas, about 15 years. On September 5, 1922, as shown by Deed exhibited, my husband and I bought 44 acres of land about 3 miles north of McGehee to use for the purpose of farming, for which we paid \$6,000, or approximately \$136 per acre.

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**S. C. RILEY**, in rebuttal for Plaintiff, testified:

I live in Halley, Desha County, Arkansas, and am familiar with the 50 acres of land about  $2\frac{1}{2}$  miles east of Halley, not on any improved highways, of which 42 acres was in cultivation and the rest in the woods, which was sold by S. C. Riley on November 23, 1926, as shown by this Deed I exhibit, for \$4,200 in cash. These values continued in that community until it was generally known that the Jadwin Plan had been adopted. The map shows this land is in the floodway.

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**MRS. ETHEL COURTNEY**, in rebuttal for plaintiff, testified:

I have lived in Halley, Desha County, for 16 years, and have assisted in managing the business affairs of my mother-in-law Mrs. Emma E. Courtney. I am familiar with the 80 acres of land bought by Emma E. Courtney from Shirley Willis, October 27, 1924, for \$800 as shown by this Deed I exhibit. This land was entirely in the woods, on no improved highway.  $2\frac{1}{4}$  miles east of Halley, cutover timber land. During that period and up until about 1928, we paid around \$40 per acre for such land in the woods in that community. The market value of cultivatable lands during that period was around an average of \$75 to \$100 per acre. We were buying and selling land constantly, and lending money on land during that period, and I am familiar with the land values. The Macon Lake plantation is located 5 miles below Halley on the State highway running South. The value of cleared land in the vicinity of Halley continued from \$100 to \$125 per acre until after it was definitely known we were in the fuse plug area. In 1936, we bought 67 acres for less than \$8 an acre.

Cross-Examination.

In January, 1937, I transferred 154 acres of land in this vicinity to my mother-in-law, Mrs. Emma E. Courtney, reciting a consideration in the Deed of \$4,000. The 1927 flood was the largest we ever had. We are as much interested in the outcome of these suits against the Government as anyone else in the floodway.

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**R. E. FURLONG**, in rebuttal for plaintiff, testified:

I have lived in Arkansas City, Desha County, Arkansas, 34 years, engaged in farming and contracting work. On January 25, 1927, I bought from Missouri State Life Insurance Company 22.32 acres of land, of which 17 acres was subject to cultivation, about 2 miles northeast of plaintiff's land, for



which I paid something more than \$98 per acre. This land is not located on a paved highway like plaintiff's land. It is a mile and a half north of Arkansas City and the road. Those values continued in that community until in the Fall of 1928, or early in 1929, when we heard we were put in the river by the Jadwin Plan.

#### Cross-Examination.

This land is within the floodway under the Jadwin  
331 Plan. I bought the land before the flood of 1927.

After the flood of 1927, prices or values did not decrease until after the Jadwin Plan. Probably 5 feet of water was on this land during the 1927 flood. The water was on the property until too late to make a crop that year. The 1927 flood was the greatest flood we ever had, but we figured we were not really damaged except as to the buildings on the property. The flood did not decrease the market value of the property. We had floods in 1912 and 1913 and they did not decrease the value of our land. No flood waters have been on the land since 1927. There is no value on our property now. We do not consider it worth anything, ordinarily speaking. I let my property go back in 1930 to the people from whom I bought it. The depression had nothing to do with this particular deal. Other farmers in that community were permitting their lands to be forfeited for taxes.

#### Redirect Examination.

I own a home in Arkansas City. I have no suit whatever against the United States for damages.

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A. P. PRICE, in rebuttal for plaintiff, testified:

I have lived in Arkansas City, Desha County, for 32 years, farming. As shown by this exhibited Deed, on February 6, 1922, I bought 800 acres of land about one mile north of Arkansas City, on a dirt road, of which 300 acres was in the woods, for \$40,000, or an average of about \$50 per acre for woodland and cleared land together. Those values continued in that general vicinity until it was generally known definitely that we were thrown in the spillway under the Jadwin Plan.

After I bought this land, in 1923, I borrowed on it from the National Life Insurance Company of St. Louis, \$50,000. They valued the cleared land at that time at \$120 per acre. I lost this land in 1930. It has had no stable value at all since it has been in the Boeuf Floodway. Since I lost this \$120 an  
332 acre land I have bought additional land in that vicinity in the Boeuf Floodway, adjoining the plaintiff's land on the south, for less than \$1 per acre, paying \$100 for

160 acres from Dr. French. I have bought 87 acres from Mr. Thane, in 1933, for \$1 an acre.

#### Cross-Examination.

These lands I bought in the floodway had not been forfeited to the State. I do not recall the amount of delinquent taxes that had accumulated against the property, but something like 4 years. Of the 240 acre tract which I bought about 65 acres were in cultivation. The land I bought nearest to the plaintiff's land is in the drainage district, the levee district, the school district, like all these lands in that vicinity, so that the total tax burden against the land, I think, amounts to something over 90c a year. I have put about 115 acres of the woodland in cultivation, and have put tenant houses, barns and improvements, all of which I presume cost around \$1,500. The land is in the floodway like plaintiff's land, but is very fertile land. It will make a bale of cotton to the acre and be cheaper then you can rent it anywhere else. It is certainly worth the gamble at the price I paid.

Nearly every farmer who borrowed money met more or less trouble, but not so much out in the area where things were more stable. The land I lost went through all the past floods, but they did not damage the dirt and market values did not shrink them. Cultivated land such as mine rents at from \$5 to \$12 an acre depending upon type and improvements. We generally work the land on shares, meaning if the landlord furnishes the farming equipment he gets half the crop and the tenant gets half; if the tenant furnishes the farming equipment the land owner gets one-third of the corn and one-fourth of the cotton. These rentals applied back in 1925 and 1926. The low price of cotton does not necessarily decrease the market value of the land. The cotton market fluctuates of course, but a man who has a good piece of property naturally wouldn't want to sacrifice it just for  
333 one year.

#### Redirect Examination.

I was able to discharge all of the delinquent taxes and assessments on the lands I bought by paying them for one year only.

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W. M. NEPTUNE, in rebuttal for plaintiff, testified:

As an engineer I have been studying the cut-offs and their effects since 1933, and when I testified on direct examination I had substantially all of the information which has come into the record from the Government's expert witnesses. Due to the change in channel conditions brought about by these

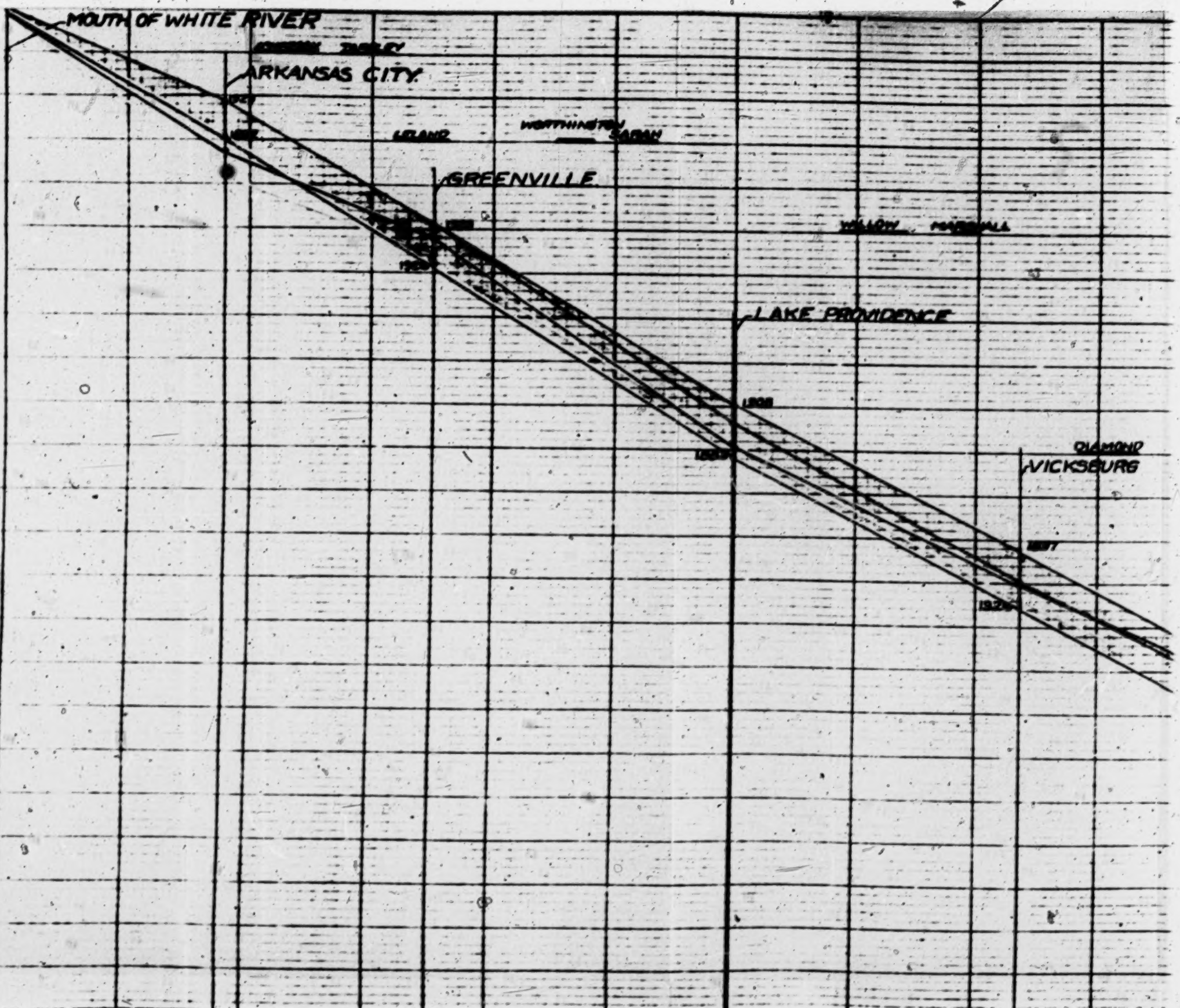
cut-offs, a new cycle of bank erosion seems to be inaugurating. At the points where the front line levees are closely adjacent to the river bank, there is an increased danger of the loss of that levee line caused by the caving banks, which increases the flood hazards of the property behind those levees. When the increased hazards of these cut-offs is weighed against the temporary lowering of the flood stage of the river at Arkansas City as testified by Government Engineers, it is my conclusion that the cut-offs have not increased the protection of plaintiff's property or this area. Whatever effects have resulted from the operation of the cut-offs to date are temporary and local. There is nothing as yet to justify the assumption that they may be permanent.

In order to determine whether or not the cut-offs have reduced the slope or drop of the river throughout the area of the fuse plug section I have prepared a graph as the result of studies which I have made of former floods of record since 1874, which I introduce as Exhibit No. 76, as follows:





DROP IN FEET FROM ELEVATION AT MOUTH OF WHITE RIVER



WILLOW POINT

DROP IN ELEVATION OF FLOOD WAVES  
FROM MOUTH OF WHITE RIVER TO ANGOLA  
GREATEST & LEAST - ALL FLOOD WAVES 1874-1935 INC.  
FLOOD WAVE OF 1929  
FLOOD WAVE OF 1936  
FLOOD WAVE OF 1937  
CUT OFFS.

LAKE PROVIDENCE

DIAMOND  
VICKSBURG

YACATAN

ROCKY

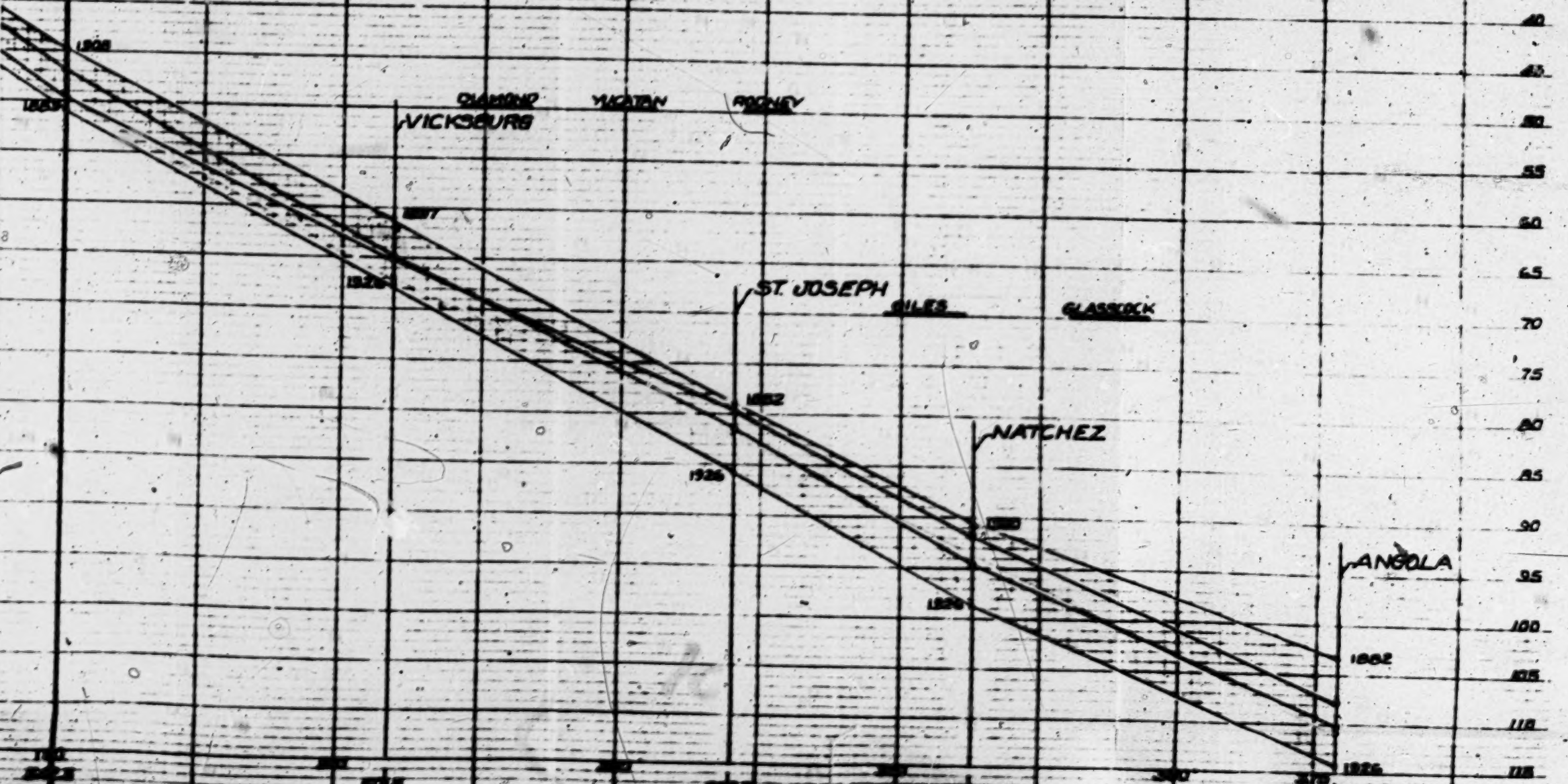
ST. JOSEPH

SILES

GLASSCOCK

NATCHEZ

ANGOLA







335 This graph represents an assemblage of some 92 separate flood waves at the mouth of the White River, and extending down to the mouth of the Red River at Angola. The shaded band shows the composite elevations of these flood crests at the various points of the Mississippi River between the mouth of White River and the mouth of Red River. The crests of the floods of 1929, 1936 and 1937, are represented by the heavy lines so marked. The location of the cut-offs are also indicated. The records, and this graph, show that below Greenville the flood crests of 1929, 1936 and 1937, are within the shaded band of the range of differences of flood crests which have been established by the past river records at those gauge points. Only at Arkansas City does the line of the flood crest of the 1936 and 1937 floods fall below the band or range which the gauge at that point had experienced in the past. The crest wave of the 1936 flood showed a relatively greater drop throughout the range of gauges down to Lake Providence than the drop of 1937. The divergence from the former range of floods at Arkansas City, up to 1933, was a drop of approximately  $4\frac{1}{2}$  feet in 1936, and  $1\frac{1}{2}$  feet in 1937.

This difference between the amount of drop registered in the 1936 flood and the 1937 flood indicates that the maximum results from the cut-offs were obtained in 1936, and that they are temporary in effect. This is in accord with the general experience with cut-offs, and with all the general trend of the literature on cut-offs. The tendency of an alluvial river like the Mississippi is to maintain its natural length. When cut-offs are made, the river forms new bends and loops so as to return to its original natural length. The new cycle of erosion to which I have referred as resulting from the cut-offs is tending to restore the original length of the river.

According to all our literature, and according to the measurements observed, the general effect of cut-offs is to speed the velocity of the river through the cut-off. This tends to lower the flood level above the cut-off, and the river  
 336 restores itself by piling up the water below the cut-off. The cut-offs made in the Mississippi River have not made any measurable change in the river at the mouth of White River.

The cut-offs are most effective while the river flows in its natural channel between its natural banks. When the river leaves the bank-full stage and begins to overflow between the levee lines, from the bank-full stage upward to the top of the levee line on either side the effect of the cut-offs is progressively less as the water rises. There is no flood menace be-



hind the fuse plug levee until the water approaches the top of the fuse plug levee. When this stage of the river is reached, the flood plane of the river is from the top of the levees on one side to the top of the levees on the other side, and at this point the cut-offs will be of so little effect as to be of no substantial protection whatever to the plaintiff's property.

I am familiar with the engineering features of both the Jadwin Plan (Flood Control Act of May 15, 1928), and the Marham Plan (Flood Control Act of June 15, 1936). In neither of these plans is any provision made for changes in the grade of the levee lines as established from Arkansas City to the mouth of Red River to take care of the increased hazards to the levees below the cut-offs. The Flood Control Act of May 15, 1928, specifically recognized that a system of cut-offs was not to be included in the plan adopted.

When the Caulk's Neck cut-off above Arkansas City develops into a substantial channel, it will tend to restore the flood lines at Arkansas City more closely approximating the original flood bank as shown on Exhibit 76. The operation of Caulk's Neck cut-off will transfer the point of greatest effect approximately to the head of the fuse plug levee, below the mouth of White River, the beginning of the back-water area, and the present increase in elevation near Grenville will be moved upstream and up the fuse plug levee.

337 The increased velocity of the Mississippi River through the Caulk's Neck cut-off will be directed on to the fuse plug levee in the vicinity of Lucca Landing. The opening up of that new cut-off channel and diversion is apt to increase the erosion that is now taking place in the head of Cypress Bend, where the fuse plug levee is relatively close to the bank of the river. This is where even at present the fuse plug levee will probably first crevasse.

The 1937 flood cannot be regarded as a fair test of the permanent effectiveness of the cut-offs so far as plaintiff's property is concerned. It is not safe to assume that the 1937 measurements can be used as a measurement for any following flood. When the 1937 flood crest was about to reach the fuse plug levee, the reservoir area beginning at the mouths of the Arkansas and White Rivers was relatively empty.

When the swift velocities through the cut-offs are retarded after it passes the cut-offs, the sediment that is being carried by the stream deposits and forms shoals and bars in the river. These velocities create new zones of erosion and new zones of silting, requiring continual dredging.

In my opinion the local interests have no right to raise the fuse plug levee above the 1914 grade. It cannot be done without destroying the effectiveness of the Jadwin Plan. One of the designated elements of the Jadwin Plan is to keep the fuse plug levee as such in order to preserve the elevations of the levee system above and below it.

When the flood channel of the Mississippi River reaches a stage of 60.5 feet on the Arkansas City gauge, the point where the fuse plug levee would be overtopped so as to injure the plaintiff's property, the surface of this flood plane has not been shortened at all by the cut-off system. Topographically, the Arkansas River is just as far from the Red River as it was before the cut-off system was started. All that has  
338 been shortened by the cut-offs is the channel of the river within its natural banks, which channel flows back and forth within the flood plane as defined by the levee lines.

One of the defendant's witnesses stated that one of the reasons for the modification of the Jadwin Plan was to take advantage of the increased channel capacity of the river that has been obtained from the channel stabilization program, meaning the cut-offs. No such reason is given by the Chief of Engineers in Committee Document No. 1, which is the basis of the Flood Control Act of June 15, 1936. To my mind, cut-offs have not stabilized the channel. They are an element of instability. They radically change the established channel conditions.

One of the Government witnesses testified that the slopes in the river have tended to parallel since the cut-offs. On the contrary, there have been material changes in the slope between Arkansas City and Angola, almost unprecedented in the 1937 flood between the mouth of the Arkansas River and Lake Providence.

With reference to the difference in the discharge capacity of the Mississippi River in the latitude of Arkansas City in the 1937 flood as compared with the 1929 flood, that difference does not seem to be an unusually large variation in discharge between any two floods, regardless of any cut-offs. Going back over the record of observations on the river before there were any cut-offs, there are several instances where a difference of much the same magnitude is observed between different floods in different years, and between different days of the same flood in the same year. Each flood wave varies in its discharge as compared with other flood waves of approximately the same gauge height. Such variations in the discharge of different flood waves is the natural and normal con-

dition, and varies from year to year with different types of flood crests. A sharply rising flood, similar to that of 1937,

339 will show an abnormally higher rate of feet discharge as compared with a long sustained flood, with a series of peaks pyramiding on a full lower river, like the floods of 1927 and 1929, which invariably give higher readings on the gauge and comparatively low feet discharge rates as compared with the height of the gauge.

The hydraulics of the Mississippi River have not yet been developed. We are still trying to develop it. There have not been enough sustained observations on the Mississippi River as yet to develop its hydraulics.

No flood reaching the mouth of the Arkansas River from the upper Mississippi River has been sufficient to overflow or crevasse the fuse plug section of the levee since it was closed in 1921. This is true of all of the levees from the mouth of the Arkansas River to the mouth of the Red River. In 1927 there was a combined flood from the upper Mississippi and from the White and Arkansas Rivers reaching the mouth of the Arkansas River at practically the same time. This produced an unusually large flood in the middle section of the Mississippi River. The land in Arkansas was overflowed in that flood by Arkansas River water crevassing the levees on the south bank of the Arkansas River.

For the sake of safety, a levee line should have from 3 to 5 feet of freeboard. During the 1937 flood there was a minimum freeboard of 4 feet on the fuse plug levee at one place. In 1937, the maximum reported discharge at Arkansas City was 2,137,000 cubic second-feet. Only approximately 170,000 cubic second-feet were coming out of the Arkansas and White Rivers in 1937. In 1927, the maximum discharge of the White and Arkansas Rivers past the latitude of Arkansas City was considerably in excess of 1,712,000 cubic feet per second. (House Document No. 798, p. 110, table No. 14.) Therefore, if the discharge of the White and Arkansas Rivers in 1937 in conjunction with the flood from the upper Mississippi River at the mouth of the Arkansas River had been the same as it was in 1927, the water would have been  $14\frac{1}{2}$  feet over the top of the fuse plug levee gauge of 60.5. This would  
 340 have made 21 additional feet of water, so that the fuse plug levee would have had to be at a gauge of 74 feet, without any freeboard, to pass such a flood. With the customary freeboard, in order for the fuse plug levee to have safely carried such a flood, it must have been  $17\frac{1}{2}$  to  $18\frac{1}{2}$  feet higher than it now is.

If 528,000 cubic second-feet of water had come out of the Arkansas and White Rivers to join the 1937 flood crest it would have increased the gauge along the fuse plug levee 10.1 feet, calculating 52,000 cubic second-feet for each foot of gauge. This would have been approximately 5 feet over the top of the present fuse plug levee; and if this had not been diverted through the Boeuf Floodway it would have overflowed the whole alluvial valley of the Mississippi River below the mouth of the Arkansas River.

By comparing the discharge of the river at Arkansas City for similar gauges in 1927, when there was no cut-off and in 1935, when Leland cut-off was operating 35 miles below, I observe that the cut-off had no substantial effect at Arkansas City, 35 miles upstream. The nearest cut-off to the present head of the fuse plug levee at Yancopin is Ashbrook cut-off, which is approximately 65 miles downstream.

#### Cross-Examination.

My conclusions are based upon a study of the gauge readings and discharge records, and such conditions regularly published by the Mississippi River Commission, the public records and my own experience.

#### Redirect Examination.

The fluctuation in the flood plane at Arkansas City of  $4\frac{1}{2}$  feet in 1936, and less than 2 feet in 1937, may be unusual, but is not of a sufficient degree to justify the conclusion that the cut-offs have established a permanent condition on the river. Such fluctuation is often experienced in the record before there were any cut-offs. In the past the river has itself so constantly changed its own conditions as to make such variations, and changes in discharge capacities, normal in

341 studying any series of floods from year to year. The very purpose of the establishment of the Boeuf Floodway was to eliminate the necessity of raising the levees high enough to carry a combination of the 1937 flood out of the upper Mississippi and a 1927 flood out of the Arkansas and White Rivers. That is the understanding I have of the plan.

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S. L. WONSON, in rebuttal for plaintiff, testified:

I am familiar in a general way with the series of cut-offs that have been placed in the main channel of the Mississippi River below the mouth of the Arkansas River, and as an engineer have studied the probable effect of these cut-offs in relation to the flood control program of the Mississippi River as authorized by the Jadwin Plan, and later as connected with



the so-called Markham Plan. These cut-offs are not included in those plans. These cut-offs certainly will not reduce the flood hazard. I am inclined to believe they will tend to increase the flood hazard.

The Mississippi River, like all alluvial streams, constantly writhes like a serpent, twisting and changing its alignment with the natural forces that act upon it. In past years natural forces created a great many cut-offs. From 1765 to 1882, we have a record of 19 cut-offs that occurred, 2 of which were artificial, shortening the normal river channel by these cut-offs some 228 miles. Nevertheless, in 1929, the channel of the river was only 2 miles shorter between Cairo and Baton Rouge than it was in 1765. Acting under the influence of natural forces the river had restored its cut-off length. Artificial cut-offs do not repeal the laws of nature. The river will inevitably tend to restore its length. The river will prevail over all of man's opposition to its natural regimen. The adopted plan of flood control very wisely recognizes that specific principle. We must work with the river and not against it.

342 I have heard all of the testimony of the defendant's engineering witnesses and have examined all of their series of exhibits. I have discovered nothing in that testimony, so far as the facts involved are concerned, to cause any change in my first testimony in this case relative to the flood menace of plaintiff's property. The 1937 flood discharge at Arkansas City was a normal discharge due to well known causes and abnormal conditions. I cannot get excited about that. Even back in the dark days of 1912 and 1913, when the levees were 3 or 4 feet lower than the 1914 grade, there went by the levees at Arkansas City more than 1,000,000 cubic second-feet of discharge.

Only the 1937 flood has come down the river since these cut-offs have been made. No dependable conclusion as to the ultimate effects of these cut-offs can be reached based only upon that one 1937 flood. Already certain tendencies of channel deterioration have developed. Judging from past experience, it might require from 25 to 50 years to determine the ultimate effect of these cut-offs.

The effect of these cut-offs is local, as well as temporary. The Mississippi River is a drainage trough. We know that water flows downhill. The more downhill there is the faster the water flows and the greater the quantity. If we cut out a part of that trough and put in a special slope, like a cut-off, in that location we have the effect of rapids in a river. More

water goes, and goes faster. But below that section, there is a limit to the capacity of the trough. The water will, of course, pile up in that lower section.

The channel of the river is below bank-full stage. After the water rises over the banks, then the flood channel is defined by the levees, creating the entire flood channel between the levees. When the water flows over the banks, the effects of the cut-offs become progressively less as the water rises. The normal channel may be shortened by cut-offs, but they do not in any degree shorten the flood channel as defined  
343 by the levees.

As to the claim that the local property owners could raise the fuse plug levee above the 1914 grade, from an engineering standpoint the maintenance of the fuse plug levee at the 1914 grade and section is definitely and specifically an essential and vital feature of the plan adopted by the Flood Control Act of May 15, 1928. If this fuse plug should be raised by any authority, one of the essential, vital features of the Jadwin Plan would be cancelled. We would be back under the previous condition and history where, when river floods come down the river, the levee would break here one year and there another. All of the area now protected would be more or less under the same hazard. The flood control plan of June 15, 1936, the Overton Bill adopting the Markham Plan, does not take into account any increase of channel capacity of the river obtained by these cut-offs, but rather looks upon cut-offs, with indulgent eyes, as the eccentricities of some enthusiast.

#### Cross-Examination.

My testimony is based upon a study of all of the plans, and I have been listening to the testimony of the Chief of Engineers of the United States, and his immediate associates. I have studied the records of the Mississippi River Commission. I have never personally made any cut-off in the Mississippi River. I have gone on a steamboat through several of them. My information is scientific and not legendary. The reason I think the cut-offs might have a tendency to increase the flood hazards to the particular locality of plaintiff's property is because they upset the natural regimen of the river, and make its behavior more problematical.

If we are to control the Mississippi River we must work to some extent in line with its natural tendencies, rather than against them. The levee system has been a failure since the start because the levees work against the natural tendency of the river. The present engineering principle of flood con-

344 trol is a distinct advance in this respect in that it has recognized the desirability of providing some other arrangements besides levees only. It provides for the diversion of water out of the main channel that the levees cannot carry. In House Document 90, the Chief of Engineers of the United States himself declares "man must not try to restrict the river too much in extreme floods. The river will break any plan which does this. It must have the room it needs to accord with its nature, and must have that room laterally."

I think there were two elements which caused more water to go down the river in 1937, at a lower stage at Arkansas City than previously. One was the temporary effect of the cut-offs, which had already disappeared somewhat from the previous year. The other was the low stage of the river below the mouth of the Arkansas and the White, an empty trough. No man can say in what proportion these two causes acted. The low Arkansas and White Rivers affected the gauge at Arkansas City.

I live in St. Louis. My duties are the general supervision of the engineering work of the Missouri Pacific Railroad Company.

#### Redirect Examination.

This cut-off program was a rather startling proposal with which engineers were not in accord, and for that reason it was a very interesting study. I have studied all of the official literature on the subject, giving preference to the articles of those that had responsible charge of the flood control of the Mississippi River, and the determination of policy, thinking they were best informed. I have studied these cut-offs, and their effects, as applied to the plaintiff's property in this suit. The flood control of the Mississippi River is one of the greatest engineering problems of modern times. A man going out on the river and looking at what he can see with his physical eye, or what he can measure with a current meter, has no more insight of the problem, or of the things that enter into the solution of the problem, than an instrument in a great war has of the strategy and tactics of the commander-in-chief.

345 P. T. SIMONS, in rebuttal for plaintiff, testified:

I have followed the defendant's testimony in this case and have seen the various exhibits offered. No evidence as to the effect of cut-offs in the river would cause any change in my former testimony in this case. In my judgment, the

cut-offs neither have had, nor will have, any effect on the flood hazards of plaintiff's property. No effects have been indicated that would prevent the overtopping of the fuse plug levee.

The history of cut-offs indicates that the effects of cut-offs are temporary and local. As the flood stage passes over the bank-full stage in the channel of the river and approaches the top of the levee line, there is a progressive decrease in the effect of the cut-offs.

I have been familiar with the middle section of the Mississippi River for 20 years. In 1935, the United States Government constructed about  $2\frac{1}{2}$  miles of revetment at Yellow Bend, just below Arkansas City, at a cost of \$500,000, to prevent further bank caving and erosion at that point. Ashbrook cut-off was put in immediately below downstream from this revetment. I inspected that point the day before this trial began. The 1937 flood destroyed the effectiveness of that \$500,000 of revetment work, caused by the Ashbrook cut-off increasing the velocity along this revetment.

#### Cross-Examination.

Bank caving began at Yellow Bend as early as 1912. The revetment work was completed in 1935. I examined the condition of the revetment after the 1937 flood by walking over it and looking at it, as an engineer does. I did not see its condition under the water. In my study of these cut-offs I have studied the reports of all branches of the War Department upon the Mississippi River, including the hydraulic laboratory at Vicksburg, and the annual reports of the Chief of Engineers, and the special reports to Congress. Since 1927, approximately one-half of the total time in my work has been a study of the Mississippi River flood control problem, principally as it affects the Missouri Pacific railroad properties.

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#### Redirect Examination.

If the diversion from the main channel of the Mississippi River should be moved downstream from the Boeuf Floodway entrance it would destroy the relief to the levees on the south bank of the Arkansas River from Pine Bluff to Yancopin.



HUGH R. CARTER, on behalf of plaintiff, testified:

I have lived in Arkansas for 50 years, all of my life. Since my graduation from the University of Arkansas in 1907, I have practiced my profession as a civil engineer. I was State Highway Engineer for the State of Arkansas for 6 years. My engineering experience has covered levees and drainage. I have had occasion to familiarize myself with the flood control plan of the Mississippi River, commonly called the Jadwin Plan, as adopted by the Flood Control Act of May 15, 1928.

I have had occasion to consider the cut-offs which have been put into the channel of the Mississippi River below the mouth of the Arkansas River. I do not think these cut-offs will be beneficial, or have any appreciable effect, on the flood hazard of plaintiff's property in the future. This conclusion is based upon experience and the study of all available records of previous floods in connection with the 1937 flood since these cut-offs have been made. Without a highly organized and extremely expensive maintenance program and stabilization structures the effects of these cut-offs will be temporary. From the record of past floods I would say that the effect of these cut-offs indicate that they are local. As the flood stage increases above the bank-full stage of the river, the efficiency of the cut-offs is reduced. The flood channel of the Mississippi River is from levee to levee. Only with the gauge of the Mississippi River levees 60.5 on the fuse plug levee is there danger of the fuse plug levee being overtopped and thus menacing the plaintiff's property. At that stage, I do not think the cut-offs will decrease the flood hazard at all.

347 I do not think the 1937 flood is a proper test of the efficiency of the cut-offs. The storage basin, beginning at the mouths of the Arkansas and White Rivers, was extremely low, which prevented a very fast run-off into the main channel of the river. Had there been water in the Arkansas and White Rivers in 1937, comparable to 1927, the fuse plug levee could not have safely carried the combination of the two floods past the fuse plug levee without the diversion into the Boeuf Floodway as planned. The volume of water of any particular flood at any particular point has not been reduced a single cubic second foot by reason of these cut-offs in the middle section of the Mississippi River.

The increased velocity caused by the cut-offs, when located near the levee line, increases the hazard by endangering the levee line. I think that when Caulk's Neck cut-off above Arkansas City, is in operative condition, it will materially in-

### Cross-Examination.

In 1908, I was engaged in designing and building about 60 miles of levee system on the Red River. I have done some reconstruction work on levee lines of the Arkansas River, not involving large amounts. In my general practice I have handled several drainage districts, and other matters affecting hydraulics.

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ARTHUR E. HEAGLER, in rebuttal for plaintiff, testified:

I have lived in Arkansas 33 years and am practicing civil engineering. For the past 23 years the greater portion of my work as an engineer has been on levees, drainage and flood protection work. I was employed by the United States Department of the Interior for the past two years. I was employed by the Federal Land Bank of St. Louis to make drainage and flood investigations in Arkansas, Missouri and Illinois, and investigated the area in Southeast Arkansas  
348 covered by the Boeuf Floodway created by the Flood Control Act of May 15, 1928. I reported my findings to the Federal Land Bank of St. Louis.

I have given my attention to the testimony introduced by the defendant's engineer witnesses in this case relative to cut-offs. As an engineer I have constructed cut-offs myself on various streams smaller than the Mississippi River. I know that when the soil is not sufficiently stable serious deterioration occurs in the channel below the cut-offs.

From the discharge rating curve graph of the Mississippi River discharges, introduced by the defendant, I have calculated mathematically the quantity of flow in a discharge, expressed in cubic feet per second, necessary to raise the gauge height in the vicinity of Arkansas City one foot. In the upper stages of the 1937 flood a volume of 52,000 cubic feet per second of water raised the gauge at Arkansas City one foot. Accepting the Government's exhibit as true, for approximately every 50,000 cubic second-feet of additional water emptied out of the White and Arkansas Rivers into the 1937 flood crest, the gauge at Arkansas City would have risen one foot.

I do not think that these cut-offs in the channel of the Mississippi River have done away with the flood hazards to plaintiff's property created by the placing of plaintiff's property in the Boeuf Floodway by the Flood Control Act of May 15, 1928. The effects of the cut-offs are local and temporary. There has been a serious deterioration in the river below Arkansas City. This is shown by the Government's rating curve

channel between the rising and falling stream. On January 27, 1937, as the river was rising, at a gauge of 48.01 feet the river was discharging 1,602,000 cubic feet per second, while in the same flood, with a 6 foot higher stage, on March 1st, the river was discharging only 604,000 cubic feet per second.

That much difference in the discharge capacity of the 349 river during the 1937 flood indicates that something was happening in the river below where this measurement was made. An unstable condition was taking place. A shoaling or deterioration of the channel developed there, a silting up with sediment brought down from erosion of the banks upstream. When water comes through the cut-offs and reaches the floor of the river below it causes silt to deposit. On May 9, 1937, I visited Yellow Bend and could see that a decided amount of erosion and caving of the banks was taking place on both sides of the river there. A great deal of the revetment at Yellow Bend was destroyed by the 1937 water.

Cut-offs in smaller channels of small streams that have good heavy clay that can resist erosion would be satisfactory. We built cut-offs where our velocities did not exceed 3 or 4 feet per second in that type of stream, that is about the limit of where cut-offs are satisfactory. My only experience with flood control was with the St. Francis Levee Board and in the flood of 1916. I have had considerable experience in discharge observations over this State, and on the Big and Sunflower Rivers in Mississippi. I have never worked for the Mississippi River Commission. From my experience it is reasonable to believe that it would be impossible to hold a series of these cut-offs without a large amount of revetments and pavement of some sort; and I seriously doubt that these revetments placed in channels where they receive the velocity that they did in the recent flood, can be held. When the cut-off is first blown in it is narrow and water velocity becomes high. As time passes, it deepens in the channel and widens from bank to bank. The upper cut-off has a tendency to develop while the lower cut-off would not be as efficient for a few years because of the deterioration in the channel that would naturally take place. They would have to keep dredging out the accumulation of sand and silt. I do not believe the Government will continually spend the money necessary to maintain all these cut-offs. I do not know the plan of the Mississippi River Commission for the maintenance of these cut-offs. In 350 my opinion these cut-offs will not do the job.

#### Redirect Examination.

The Mr. Pharr under whom I did flood control work in 1916 for the St. Francis Levee District is now a member of the Mississippi River Commission.

Plaintiff moved the Court to strike from the record all the testimony introduced relative to the cut-offs which were developed after the filing of plaintiff's suit. Motion overruled and plaintiff's exceptions saved.

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Plaintiff moved to strike from the record all that part of the testimony dealing with the modifications of the flood control plan authorized, under certain conditions, by the Act of June 15, 1936, the Markham Plan. Motion overruled and plaintiff saved exceptions.

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Mr. Dyott: In addition to counsel's motion I would like to move to delete the record and strike from the record as evidenciary matter all exhibits and testimony as to public documents to which counsel has referred and which appear in the record as evidenciary matter. For the reason that they may be received upon the same determination and same authority and in the same way the court has just received the last document.

The Court: Well, I don't understand they have ever been received as evidence, Mr. Dyott, but I see no objection to sustaining your motion if that will relieve the situation to any extent. I don't see that you need it, but your motion will be sustained, and we understand it that way. These documents are not evidence in the case.

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351 GEORGE CLEMENS, recalled by defendant in sur-rebuttal, testified:

We have been able to determine by our studies in comparing the 1937 flood with other floods that the lowering which has been accomplished by the cut-off system is not local, but continues throughout the entire stretch of the river from Arkansas City to below Vicksburg.

I am unable to make or draw any conclusion from the diagram introduced by Mr. Neptune as Exhibit 76. The diagram does not present a proper comparison of the various effects of the various years shown. In preparing the diagram no account has been taken of the variations in stream flow which existed at the time on the various points.

The rating curve graph which we introduced indicates a loop, but rating graphs normally have a loop of various sizes, and I would not say that the rating graph is evidence of permanent deterioration of the channel. We have made frequent



surveys of the entire river and have not yet discovered any great evidence of channel deterioration.

We have found a definite lowering of the flood profile. Dredging is an integral part of the entire stabilization program.

The peak flow of the 1927 flood was 20% greater than the 1929 flow, but passed Grenville at a foot and a half lower stage.

From our studies of the river channel and from our surveys of the entire river we have made surveys of the same section as often as every two weeks, others once a year, others at more infrequent intervals, and we have discovered as yet no great evidence of channel deterioration. Further evidence of that, and I believe this last is the best evidence, is in the consideration of the river slope. By studying the slopes we find that we have maintained satisfactory slopes throughout the reach and I have found no concrete evidence of deterioration, but we have found definite lowering of the flood profile.

According to our observation of the other recent cut-offs, Caulk's Neck cut-off will not transfer the danger point down the river to an ordinary stage of rise at Arkansas City.  
352 That is an old theory that was believed for some time, and was perhaps one of the factors that was effective in keeping river commissions and river engineers from embarking on a cut-off program.

The program includes cut-offs as one of the items. It is a program of channel enlargement, channel improvement. We hope to dispose of the water in a more expeditious manner and the results have been most gratifying in accomplishing this purpose. The cut-offs by themselves are merely one link in the chain. The dredging is not governed by the cut-offs but is an integral part of the entire system. I can speak particularly on that because the dredging is specifically my duty to follow up. The dredging was not an indication of channel deterioration but is done to assist in completing the stabilization program. It is true that we dredge in certain localities to improve navigation but the major part of the dredging activity is to stabilize the channel and improve the channel as a part of this comprehensive program. It is one program, dredging and cut-offs.

Shortening the river channel 100 miles by cut-offs has a very material effect upon the flood channel of the river. The major portion of effective flow actually flows within the channel of the river at a much greater velocity than the velocities

that must pass through this channel is permitted to flow through a shorter channel we have effectively shortened the flood channel.

I have been unable to find any basis for the statement that the stages at Greenville showed an increase in height. The statement was made but the facts presented showed that Greenville was actually lower in 1937 than it was in 1929 in spite of the fact that the 1937 flow was approximately the same amount there as it was at Arkansas City. That is, the flood passed Greenville at a stage, as I recall the testimony, it was a foot and a half lower but the peak flow was 20% greater.

353 The 1937 flood would have crevassed the fuse-plug levee if we had not had the cut-offs. No other flood since 1927, has been high enough to crevasse the fuse plug levee. The 1937 flood, largely from the Ohio River, was large enough to have crevassed the fuse plug levee.

The shortening of the river one hundred miles by the cut-offs has very materially effected the flood channel of the river. The flood channel is that following the central line of the levee system.

To determine the effect of cut-offs and carry on the general program of channel improvement requires continuous and comprehensive observations and study, with a vast amount of detail data. I would like to say that conclusions reached from the old records and old readings are exactly the type of conclusions I would expect engineers to reach from a study of the past observations and analyses of various opinions we have in the past record. They do not have the complete information that has recently become available to us. It is impossible to publish everything we have. It is probably true that cut-offs, if created as nature has created them in the past, if left alone without dredging and maintenance and upkeep and care and control would probably not be effective for a long period of time. Caulk's Neck cut-off will add to the efficiency of the other cut-offs.

The maintenance of the cut-offs and dredging is distinctly a part of the program in connection with the maintenance and upkeep. We have a number of dredges in each district that are continually working on this general program of channel improvement and their efficiency has been steadily increasing.

GERARD H. MATTHES, recalled for defendant in sur-rebuttal, testified:

It has always been found when making cut-offs incorrectly that a piling up of the water results below them. In our work down on the Mississippi River the only time we have ever noticed the slightest piling up of water below is when the cut-off is first opened.

The principles that have been employed in this work which we have discussed in this case relating to channel stabilization are novel. They are novel to the extent that no description of them, or of the hydraulic principles which were employed, have ever appeared anywhere in print. I speak advisedly because I am concerned with making that subject public when the time comes, when I am permitted to do so. Up to the present time none of the engineers witnesses for the plaintiff who have testified here have been in position to discover, or to find out, either by study or by inquiry, just what are the hydraulic principles employed. It has not been made public. Therefore, they have not been in position to size this matter up from a correct point of view. I am frank to say that I am not at all in disagreement with the statements which these engineers, especially those experienced with the cut-off work, have made, because from their point of view, and under the conditions which they described, they were probably entirely correct. Those conditions are not applicable to what we are doing on the Mississippi River today. As I said, the work is being done in a novel manner; and I do not see how it is possible for any engineers, outside of those immediately connected with it to be in a position to judge whether it is being done right or wrong.

Dredging is one of the important features of our channel stabilization program. Cut-offs alone do not improve a river. It has not been maintained by me, or any of the engineers testifying for the defendant, that cut-offs alone would improve this river, or lower the water surface, or stabilize the channel. On the contrary, cut-offs are only a step in the program and in order to secure a stabilized channel it is necessary to follow that up with the maintenance of very effective and intelligent dredging work.

Here the defendant rested.

The following stipulation was filed:

(Stipulation Relating to Facts.)

In The United States District Court, Eastern Division Of  
Arkansas, Western Division.

Mrs. Julia Caroline Sponenbarger, Plaintiff,

No. 7984. vs.

The United States of America, Defendant.

This stipulation is for the purpose only of this action and is filed with the understanding that it is not to be binding upon any party in any other action which is now pending or which may be hereafter instituted.

It is stipulated and agreed that various records show the following facts pertaining to the Cypress Creek Drainage District and the Southeast Arkansas Levee District:

356 A. H. Rowell and W. R. Humphrey were appointed receivers for Cypress Creek Drainage District by this Court on January 15, 1930; that they were in charge of the said district until April 9, 1937, on which date they were discharged as such receivers by the order of this Court and the affairs of the district and its management were on said date again placed with the Commissioners of the district.

Grady Miller was appointed receiver of the Southeast Arkansas Levee District by an order of this Court on February 5, 1932. He has been continuously in charge of the affairs of said district from and since said date and is now in charge thereof as such receiver.

Special benefit assessment taxes constituting a first lien have been levied against the property involved in this action by and in favor of the Cypress Creek Drainage District in the sum of \$800.00. There has been paid of said assessment the sum of \$480.00. There is now outstanding and unpaid of said assessed benefits the sum of \$320.00 not yet due but against which taxes will be levied annually by the said district.

The land involved in this action is also subject to an annual improvement tax of thirty cents per acre levied by the Legislature of Arkansas in favor of the Southeast Arkansas Levee District, which tax, along with a similar one which was levied against all the other lands in the district, was levied for the purpose of making improvements costing in excess of \$3,000,000.00. There is now outstanding and unpaid bonds of said district and of its predecessors, the payment of the lat-



ter having been assumed by the said district, of an aggregate amount of \$2,957,500.00.

# I.

## Bond Issue of The Cypress Creek Drainage District Dated February 1, 1916

St. Louis Union Trust Company, Trustee.

The Cypress Creek Drainage District issued and sold on February 1, 1916, bonds in the aggregate principal amount of \$700,000.00 maturing serially on the first day of August of each year from 1922 until 1946, inclusive, bearing interest at the rate of 5½% per annum.

357 There remains outstanding and unpaid of said indebtedness, bonds in the principal amount of \$650,000.00 and the interest thereon from the 1st day of August, 1929.

That to secure the payment of said bonds, the said district on February 1, 1916, executed a written mortgage and pledge to the St. Louis Union Trust Company, a Missouri corporation, by which it conveyed to said company, as trustee, the properties and revenues of the district, including all uncollected assessments levied by the district on the real property, railroads and tramroads therein, together with all assessments which might thereafter be levied on said property. That said bonds and said mortgage and pledge are a first lien against the said assets. The St. Louis Union Trust Company owns a number of said bonds of the par value of \$167,500.00.

# II.

## Bond Issue Of Cypress Creek Drainage District Issued April 1, 1921

Franklin-American Trust Company, Trustee.

Said District issued and sold on April 1, 1921, bonds in the aggregate principal amount of \$500,000.00 maturing serially on the first day of April in each of the years from 1922 to 1946, inclusive, bearing interest at the rate of 6% per annum. There remains outstanding and unpaid of said indebtedness bonds in the principal amount of \$449,000.00 with six months' interest thereon for the last half of the year 1927 and all of the interest thereon from and since February 1, 1929. That to secure the payment of said bonds the said district on April 1, 1922, executed a written mortgage and pledge to the American Trust Company, now the Franklin-American Trust Company, a Missouri corporation, by

which it conveyed to said company, as Trustee, the said properties and revenues of the district, including all uncollected assessments levied by the district on the real property, railroads and tramroads, together with all assessments which might thereafter be levied on said property. That said mortgage and said bonds and pledge are a second lien against the said assets.

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## III.

## Bond Issue Of Cypress Creek Drainage District

Issued April 1, 1922

Franklin-American Trust Company, Trustee.

Said district issued and sold, on April 1, 1922, bonds in the aggregate principal amount of \$300,000.00, maturing serially on the first day of September in each of the years from 1927 to 1946, inclusive, all of which bonds are now outstanding with six months' interest thereon for the last half of the year 1927 and all of the interest thereon from and since February 1, 1929. That to secure the payment of said bonds the said district, on April 1, 1922, executed a written mortgage and pledge to the American Trust Company, now the Franklin-American Trust Company, a Missouri corporation, by which it conveyed to said company, as Trustee, the said properties and revenues of the district, including all uncollected assessments levied by the district on the real property, railroads and tramroads, together with all assessments which might thereafter be levied on said property. That said mortgage and said bonds and pledge are a second lien against the said assets.

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## IV.

## Bonds of the Southeast Arkansas Levee District

Dated January 1, 1916.

St. Louis Union Trust Company, Trustee.

The Southeast Arkansas Levee District issued and sold on January 1, 1916, bonds in the sum of \$600,000.00, payable serially on July 1st of each year from July 1, 1923, to July 1, 1937, inclusive, bearing interest at the rate of 6% per annum. There remains outstanding and unpaid of said indebtedness of said district \$342,000.00 and the interest thereon from July 1, 1932. The St. Louis Union Trust Company owns a number of said bonds of the par value of \$118,500.00. To secure the payment of said bonds, the said district, on January 1, 1918, executed a written mortgage and pledge to the St. Louis Union Trust Company, a Missouri corporation, by

which it conveyed to said company, as trustee, the property and revenues of the District including all uncollected assessments levied by the said district on the real property, railroads and tramroads, together with all assessments that might thereafter be levied on said property. That said bonds and said mortgage and pledge are a first lien against the said assets.

## V.

**Bond Issue of Red Fork Levee District Dated August 1, 1915**  
**St. Louis Union Trust Company, Trustee**

The Red Fork Levee District issued and sold on August 1, 1915, bonds in the sum of \$100,000.00 payable serially on August 1st of each year from August 1, 1916 to August 1, 1936, inclusive, bearing interest at the rate of 6% per annum. There remains outstanding and unpaid of said indebtedness bonds in the principal sum of \$30,500.00 and the interest thereon from July 1, 1932.

To secure the payment of said bonds the said district, on August 1, 1915, executed a written mortgage and pledge to the St. Louis Union Trust Company, a Missouri corporation, by which it conveyed to said company, as Trustee, the property and revenues of the district including all uncollected assessments levied by the said district on the real property, railroads and tramroads, together with all assessments that might thereafter be levied on said property.

Said Red Fork Levee District was merged into the Southeast Arkansas Levee District by the Legislature of Arkansas in 1917. That said bonds and the said mortgage and pledge are a first lien against the assets of the Southeast Arkansas Levee District.

## VI.

**Bond Issue of the Southeast Arkansas Levee District**  
**Dated October 1, 1919**

**Mercantile-Commerce Bank & Trust Company, Trustee**

The Southeast Arkansas Levee District issued and sold on October 1, 1919, bonds in excess of \$500,000.00, bearing interest at the rate of 5% per annum. There remains outstanding and unpaid of said indebtedness bonds in the principal amount of \$490,000.00 with the interest thereon from March 1, 1932. Said bond issue is secured by a written mortgage and pledge in which the Mercantile Commerce Bank and

Trust Company is trustee. The said mortgage and pledge conveys to said trustee the properties and revenues of the district including the uncollected assessments on the real property, railroads and tramroads therein, together with all assessments that might thereafter be levied. The said bonds, the said mortgage and pledge are a first lien against the said assets.

## VII.

### Bond Issue of the Southeast Arkansas Levee District

Dated March 1, 1921

Mercantile-Commerce Bank and Trust Company, Trustee

The Southeast Arkansas Levee District issued and sold on March 1, 1921, bonds in excess of \$400,000.00, bearing interest at the rate of 5% per annum. There remains outstanding and unpaid of said indebtedness bonds in the principal amount of \$400,000.00 with interest thereon from March 1, 1932. Said bond issue is secured by a written mortgage and pledge in which the Mercantile Commerce Bank and Trust Company is trustee. The said mortgage and pledge conveys to said trustee the properties and revenues of the district including the uncollected assessments on the real property, railroads and tramroads therein, together with all assessments that might thereafter be levied. The said bonds, the mortgage and pledge are a first lien against the said assets.

## VIII.

### Bond Issue of the Southeast Arkansas Levee District

Dated March 1, 1923

Mercantile Commerce National Bank

The Southeast Arkansas Levee District issued and sold on March 1, 1923, bonds in excess of \$300,000.00, bearing interest at the rate of 5% per annum. There remains outstanding and unpaid of said indebtedness, bonds in the principal amount of \$285,000.00 with interest thereon from March 1, 1932. Said bond issue is secured by a written mortgage and pledge in which the Mercantile Commerce National Bank is trustee. The said mortgage and pledge conveys to said trustee the properties and revenues of the district including the assessments on the real property, railroads and tramroads therein, together with all assessments that might thereafter be levied. The said bonds, the said mortgage and pledge are a first lien against the said assets.



## IX.

## Bond Issue of the Southeast Arkansas Levee District

Dated November 1, 1924

Mercantile-Commerce National Bank, Trustee

The Southeast Arkansas Levee District issued and sold on November 1, 1924, bonds in excess of \$282,000.00 bearing interest at the rate of 5% per annum. There remains outstanding and unpaid of said indebtedness bonds in the principal amount of \$282,000.00, with interest thereon from March 1, 1932. Said bond issue is secured by a written mortgage and pledge in which the Mercantile-Commerce National Bank is trustee. The said mortgage and pledge conveys to said trustee the properties and revenues of the district including the assessments on the real property, railroads and tramroads therein, together with all assessments that might thereafter be levied. The said bonds, the said mortgage and pledge are a first lien against the said assets.

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## X.

## Bond Issue of the Southeast Arkansas Levee District

Dated March 1, 1926

Mercantile-Commerce Bank and Trust Company, Trustee

The Southeast Arkansas Levee District issued and sold on March 1, 1926, bonds in excess of \$100,000.00 bearing interest at the rate of 5% per annum. There remains outstanding and unpaid of said indebtedness bonds in the principal sum of \$100,000.00 with interest thereon from March 1, 1932. Said bond issue is secured by a written mortgage and pledge in which the Mercantile-Commerce Bank and Trust Company is trustee. The said mortgage and pledge conveys to said trustee the properties and revenues of the district including the assessments on the real property, railroads and tramroads therein, together with all assessments that might thereafter be levied. The said bonds, the said mortgage and pledge are a first lien against the said assets.

## XI.

## Bond Issue of the Southeast Arkansas Levee District

Dated January 1, 1927

Mercantile-Commerce Bank and Trust Company, Trustee

The Southeast Arkansas Levee District issued and sold on January 1, 1927, bonds in excess of \$334,000.00 bearing inter-

este at the rate of 5% per annum. There remains outstanding and unpaid of said indebtedness bonds in the principal sum of \$334,000.00 with interest thereon from March 1, 1932. Said bond issue is secured by a written mortgage and pledge in which the Mercantile-Commerce Bank and Trust Company is trustee. The said mortgage and pledge conveys to said trustee the properties and revenues of the district including the assessments on the real property, railroads and tramroads therein, together with all assessments that might thereafter be levied. The said bonds, the said mortgage and pledge are a first lien against the said assets.

**E. E. HOPSON, and  
LAMAR WILLIAMSON**  
Attorneys for Plaintiff

**JOHN C. DYOTT, and  
FRED A. ISGRIG,**  
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**HENRY DAVIS, of  
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**FRED ARMSTRONG, of  
Thompson, Mitchell, Thompson  
& Young**  
Attorneys for the Mercantile-Com-  
merce Bank and Trust Company and  
the Mercantile-Commerce National  
Bank.

**DeWITT POE, and  
LAMAR WILLIAMSON**  
Attorneys for Cypress Creek Drain-  
age District

**JOE W. HOUSE**  
Attorneys for the Receiver of the  
Southeast Arkansas Levee District

The following Stipulation was filed March 2, 1937:

**Stipulation Anent Evidence**

In the United States District Court, Eastern District of  
Arkansas Western Division

Mrs. Julia Caroline Sponenbarger, Petitioner,  
No. 7984 vs.

The United States of America, Defendant.

The respective parties hereby stipulate and agree to waive the necessity of a technical authentication of any public document, or part thereof, which either party may desire to offer in evidence. That is to say, all public documents bearing the print of the Government Printing Office may be taken as official without the necessity of formal certification by the Department involved. That any facts established by legal records may be testified to by a party who has made examination of these legal records without the necessity of bringing such legal records or the keeper of same into Court. By "legal records", it is meant those records kept in the counties which show the records of deeds, mortgages and/or  
364 leases upon real estate.

It is expressly understood that while the rule of "best evidence" is hereby waived to the extent stated, and no question will be raised as to the method of introducing public records, each party does expressly save the right to object to the relevancy and materiality of the evidence so offered.

Submitted for filing in the above styled case as a part of the records thereof.

MRS. JULIA CAROLINE  
SPONENBARGER, Petitioner,  
By Lamar Williamson,  
Her Attorney.

UNITED STATES OF  
AMERICA, Defendant,  
By Fred A. Isgrig,  
United States District Attorney,  
for Defendant.

365 Whereupon, the plaintiff requested the Court, separately and severally, separately presenting each subdivision of each paragraph, to make the following:

(Findings of Fact Requested by Plaintiff.)

**Findings of Fact:**

1. The plaintiff, Mrs. Julia Caroline Sponenbarger, is a citizen of the State of Arkansas, and was such during all

times involved in this litigation. She is the owner of the lands and the claim set forth in her petition filed in this Court on August 11, 1934; and has made no assignment or transfer of her said claim, or of any part thereof, or interest therein, except as stated in her petition. The claimant has at all times borne true allegiance to the Government of the United States, and has not in any way aided, abetted or given encouragement to rebellion against the said Government. (See Title 28 U. S. C. A., Sec. 265, p. 91).

No member of the Congress has any interest or share of any kind or character in the petitioner's claim or cause of action, nor will any member of the Congress be benefitted in any way by any judgment rendered in this cause.

The plaintiff has complied with all the legal requirements necessary to maintain this suit against the defendant, the United States of America.

2. Plaintiff's petition is in fact a suit of a civil nature; and constitutes a claim founded upon the Constitution of the United States, Fifth Amendment; and upon an Act of Congress (being Public No. 391, 70th Congress; 45 Stat. 534, et seq.; 33 U. S. C. A., 702a to 702m, inclusive), being an Act entitled: "An Act for the control of floods on the Mississippi River and its tributaries, and for other purposes"; and is founded upon an implied contract of the Government of the United States to pay for damages in a case not sounding in tort; and also involves the title of, and damage  
366 to, real and personal property situated in Desha County in the State of Arkansas. (See Title 28 U. S. C. A. Sec. 41 (20), p. 625). The amount of petitioner's claim, exclusive of interest and costs, is less than \$10,000; and is, in fact, within the jurisdiction of this Court.

3. By the passage of the Flood Control Act of May 15, 1928, the United States adopted, and authorized to be prosecuted, a comprehensive plan for the flood control of the Mississippi River in its alluvial valley in accordance with the engineering plan set forth and recommended by the Chief of Engineers in a report dated December 1, 1927, printed in House Document numbered 90, 70th Congress, first session. The project as a whole constitutes one, entire, complete, comprehensive plan.

4. In the passage of said Flood Control Act of May 15, 1928, the United States for the first time assumed national responsibility for flood control on the main stem of the Mississippi River in its alluvial valley between Cape Girardeau,



Missouri, and the Head of Passes near the delta or mouth of the river.

5. The adopted project (commonly called the Jadwin Plan" in honor of Maj. Gen. Edgar Jadwin, then Chief of Engineers, the author of the plan), differed fundamentally from all engineering plans theretofore sponsored by the Government in that the Jadwin Plan was designed to limit the amount of flood water carried in the main river to its safe capacity and to send the surplus water through lateral floodways designed to relieve the main channel of the water it cannot carry and lower the floods to stages at which the levees can carry them.

6. The confinement of the Mississippi River within levees, and the great development of drainage systems prior to May 15, 1928, had raised flood stages materially and this raising had exceeded estimates made in the past. Had it been attempted to hold the water within the levee lines existing when the 1928 Act was passed by raising such levees, predicted river stages were possible 14 feet above the then levee grade at Arkansas City, a short distance below the mouth of the Arkansas River. The Government adopted as a practical means to meet this situation a plan designed to spill the water out of the main leveed channel at selected points when flood stages reach the danger point. (Doc. 90, Sec. 96).

7. Because of the large discharge from the White and Arkansas Rivers, the section of the Mississippi River from Arkansas River to Red River is probably the most critical from the viewpoint of flood control. This stretch of the river is called the "Middle Section". The high stages resulting from the combination of floods from the Mississippi, Arkansas and White Rivers make it impractical to completely confine major floods between levees in this section of the river. Any plan for controlling major floods in this section of the river must include two principal elements, namely, discharge by the main river leveed channel with levees at substantially the grade and section authorized by the Flood Control Act of May 15, 1928, and escape of excess water by a route west of the river. (Com. Doc. No. 1, Sec. 17).

8. The Jadwin Plan was based upon the finding of fact that from the mouth of the Arkansas River to the mouth of the Red River extreme floods cannot be carried between levees of the Mississippi River without dangerous increase in their heights. A floodway for excess floods was therefore provided down the Boeuf River on the west side of the Mis-

Mississippi River, below the mouth of the Arkansas River. The entrance to this floodway was closed by a safety plug section of the levee at its existing grade, located at Cypress Creek near the mouth of the Arkansas River. To insure their safety until this fuse plug section of levee opens, the other levees of the Mississippi River from the Arkansas River to the Red River were raised about 3 feet; and to prevent flood waters from entering the basin except into the floodway during high floods the levees on the south side of the Arkansas River were strengthened and raised about 3 feet as far upstream as necessary. (Doc. 90, Sec. 16).

9. The Arkansas and White Rivers, emptying into the Mississippi River just above Arkansas City, Arkansas, have been known to have a combined simultaneous discharge of approximately 1,200,000 cubic feet per second, as in the 1927 flood. Under 1928 flow conditions the resultant flow, obtained by adding the probable contribution of the White and Arkansas Rivers to the assumed flood arriving from Cairo, if confined by the raising of levees on their existent locations, would produce a stage of about 74½ feet at Arkansas City. To confine the river at such a stage the levees would have had to be raised about 14 feet. Since they were already more than 25 feet high in places, this was deemed impracticable and the alternative course was selected of providing for the escape of such waters as could not be carried in the main river between levees of reasonable height. It was decided that an increase of approximately 3 feet in existing levee heights below Arkansas City was about as much as was desirable. This limitation in the Jadwin Plan called for the escape during the maximum probable flood of about 1,000,000 cubic feet per second and the topography of the valley required that this escape be on the west side of the river. It was accordingly decided in the Jadwin Plan to raise main river levees about 3 feet; to provide for the escape of surplus flow by refraining from the enlargement, above its then existing grade, of a stretch of the west bank levee line at the head of the Boeuf Basin; and to limit the extent of overflow in the Boeuf Basin by confining the escaping waters between levees so located as to restrict overflow (as far as seemed practicable), to its lowest and least valuable lands. The portion of the river levees that was not to be raised has become known as the "Cypress Creek fuse plug". Its crest elevation is such that stages which exceed 60½ feet on the Arkansas City gage will overtop it. Data at the time indicated that under 1928 flow conditions stages in excess of 60½ feet at Arkansas City would occur not more often, on an

average, than once in 12 years. The amount of water escaping through this diversion would depend upon the size of the flood, reaching an estimated maximum of about 1,000,000 cubic feet per second in the so-called "superflood". The land in the Boeuf Basin that would be overflowed by the waters topping or crevassing the fuse plug levee is called the Boeuf Floodway. This floodway, comprising about 1,330,000 acres, 25 percent of which was estimated to be cleared land and 75 percent swamp and timber land, was designed to extend from the fuse plug levee to Sicily Island Gorge (on the Ouachita River at Harrisonburg, about 60 miles below Monroe, Louisiana). (Sec. 7, Com. Doc. No. 1, p. 18).

10. The Jadwin Plan as adopted by the Flood Control Act of May 15, 1928, recites: "The flood of 1927 rose to 60.5 on the Arkansas City gauge. It has been estimated that had it been confined and crevasses not occurred the gauge height would have been 69. The top of the present levee is 60.5. To take care of this flood with proper freeboard would require present levees to be raised about 12 feet. Such an increase in levee height would greatly intensify the disaster resulting from an accidental failure of a levee, besides being inordinately costly. Nor would they be safe, for it has been estimated that floods might come which would produce, if confined, stages of over 74 feet. It is obvious that no attempt should be made to raise levees to such a height. The practical remedy is to raise the levee grade 3 feet on both  
370 sides of the Mississippi below the Arkansas River, to strengthen these levees so that they will not fail from causes other than accident or overtopping, and to preclude overtopping by insuring that the water in excess of the capacity of the leveed channel be spilled out near the mouth of the Arkansas " river. (Doc. 90, Sec. 117).

11. Said Jadwin Plan further provides: "To insure that excess water will leave the main river, a fuse plug section of the levee in the vicinity of Cypress Creek must be kept at its present strength and at its present grade, viz., 3 feet below the new levee grade. This relatively weak section will be long enough to discharge the greatest predicted possible excess water over and above the capacity of the leveed river below. In order to limit the land in the Tensas Basin overflowed by it, levees will be constructed on each side of the Boeuf River bottom, where natural ridges do not serve, from the Cypress Creek levee to backwater in the lower Tensas Basin. Arkansas City is to be inclosed with a levee. This floodway will be wide enough to carry the water without clearing and without maintenance except for the side levees.

It is unwise to attempt to limit the volume of flow that may possibly enter the floodway to a narrower floodway that might prove of insufficient capacity. A narrower floodway cleared of timber was considered, but the clearing was found to be unwarrantably expensive in first cost and maintenance for the increased efficiency of discharge produced thereby." (Doc. 90, Sec. 118).

12. Said Jadwin Plan further provides: "The Boeuf River bottom is selected for this diversion because it is the most suitably located to receive the water, is the most direct route, has the best width, and covers largely undeveloped swamp land." (Sec. 119, Doc. 90).

13. Said Jadwin Plan, so adopted by the [Food] Control Act of May 15, 1928, further provides: "The United States must have control of the Cypress Creek levee and keep it substantially at its present strength and present height." (Sec. 120, Doc. 90).

14. Said Jadwin Plan further provides: "The remainder of the alluvial valley on each side of this stretch of the river, barring accident, will have complete protection from all possible floods." (Sec. 121, Doc. 90).

15. Said Jadwin Plan further provides: "Safety valves. In considering the plan for control of the Mississippi much study was given to providing a flexible feature such as safety-valve spillways over the levees to discharge water that might possibly come in excess of any predicted. The fuse-plug levees decided upon for the two lower sections of the river gave the flexibility desired and made unnecessary additional safety valves at this time." (Sec. 134, Doc. 90).

16. Section 9 of the Flood Control Act of May 15, 1928, was in accordance with the recommendation of Gen. Jadwin, Chief of Engineers, as follows:

"I further recommend that legislation be enacted:

"(a) Prohibiting any obstruction not affirmatively authorized by Congress to the flood discharge capacity of the alluvial valley of the Mississippi River below Cape Girardeau and providing that it shall not be lawful to build or commence the building of any levee or other structure in said alluvial valley, or in any floodway provided therein unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War." (Sec. 149, Doc. 90).



17. The special Board appointed pursuant to the provisions of Section 1 of the Flood Control Act of May 15, 1928, reported to the President of the United States under date of August 8, 1928, as follows: "The Board therefore recommends the adopted project submitted by the Chief of Engineers to the Secretary of War, dated December 1, 372 1927, and printed in House Document No. 90, Seventieth Congress, First Session." (Com. Doc. No. 28, 70th Congress, 2nd Session).

18. Under date of August 13, 1928, the President approved the general policy and method of the Jadwin Plan in the following language:

"The White House

"Washington.

August 13, 1928.

"The policy and method of dealing with the problem set out in the report, dated August 8, 1928, of the Board provided for in Section 1 of 'An act for the Control of Floods on the Mississippi River and its tributaries and for other Purposes', approved May 13, 1928, hereto annexed, are approved. The balance of the report is approved excepting and reserving for my future action those parts which contemplate the acquiring of rights in land for constructing spillways and floodways.

(Signed) CALVIN COOLIDGE."

(Com. Doc. No. 2, 71st Congress, 1st Session).

19. Under date of January 10, 1929, the President approved the Boeuf Floodway in the following language:

"The White House

"Washington.

January 10, 1929.

"Supplementing my approval of August 13, 1928, of the report of the Board provided for in Section 1 of 'An Act for the Control of Floods on the Mississippi River and its Tributaries, and for Other Purposes', approved May 15, 1928, which approval excepted and reserved for future action those parts of the report which contemplate the acquiring of rights in land for constructing spillways and floodways, the construction of the protection levees in the Boeuf Basin, as provided for in the adopted project, is approved.

373 "Land for rights of way for these levees will be secured by condemnation, as authorized by law, provided that these lands may be purchased, when they

can be thus secured at reasonable prices, which shall not in any case, exceed two and one-half times the assessed valuation at the present time.

(Signed) "CALVIN COOLIDGE."

(Com. Doc. No. 2, p. 12).

20. Therefore, on January 10, 1929, the project as set forth in House Document No. 90, Seventieth Congress, first session, as it applies to the Boeuf Floodway, became definite and fixed, with no power of modification or change, except as provided in the project itself, by any authority save the Congress. (Com. Doc. No. 2, pp. 13-16).

21. On July 1, 1929, the United States filed suit in the District Court of the United States for the Western Division of the Eastern District of Arkansas for condemnation for rights-of-way for the Guide Levee shown on the maps of the Jadwin Plan running from the general vicinity of Luna, in Chicot County, Arkansas, in a southerly direction, west of Lake Chicot, to the head of Maconridge north of Eudora, Arkansas, designed to close the upper entrance of Tensas Basin which lies between Macon ridge on the west and the Mississippi River on the east, in the States of Arkansas and Louisiana.

On the same date, said United States District Court issued an injunction prohibiting property owners and others from interfering in any way with the immediate possession of the United States for the purpose of using said rights-of-way.

Said suit, and said injunctive order, remained in effect until dismissed by the United States on December 18, 1934, four months and seven days after the petitioner, Mrs. Julia Caroline Sponenbarger, had filed her present action.

22. Funds being available for the purpose, actual construction work on the Jadwin Plan, as authorized by the Flood Control Act of May 15, 1928, was in progress on January 10, 1929, when the President approved the Boeuf Basin Floodway, and said work was continuously prosecuted so that when the present suit was filed on August 11, 1934, the entire project was approximately 80 percent complete.

23. At the time of the trial beginning May 10, 1937, approximately all work which is intended to be done by the

United States under the provisions of the Flood Control Act of May 15, 1928, had been completed, it being no longer the intention of the United States to construct the Guide Levees on either side of the Boeuf Floodway as originally contemplated for the purpose of restricting and controlling the flooded area in said Boeuf Basin.

24. The side protection, or guide, levees which have not been constructed are not at all essential to the proper functioning of the Jadwin Plan in the adopted project, but were included merely to furnish local protection or reclamation to lands not involved in the present litigation. The construction of said guide levees would have no material effect upon the plaintiff's property. (House Doc. No. 798, pp. 47, 54).

25. The Jadwin Plan had been so far completed by the Government that since approximately the year 1931, or for three or four years prior to the filing of petitioner's suit, the fuse plug levee in the vicinity of Cypress Creek and the Boeuf Floodway were in a condition to function as designed and intended by the Flood Control Act of May 15, 1928, which condition continued until the date of the filing of the petitioner's suit, and since.

26. The escape of flood waters through the Boeuf Floodway is an essential feature of the Jadwin Plan; and as late as the report of the Chief of Engineers dated February 28, 1931, was considered an essential feature of any economically feasible plan for the control of floods in the lower Mississippi Valley. (House Doc. No. 798, p. 26; Sec. 17 and p. 29, Sec. 22 (f) ).

375 27. As late as February 28, 1931, it was estimated by the Government Engineers that "The momentary peak flow into the Boeuf Basin at the vicinity of Cypress Creek may be 1,250,000 cubic feet per second, the average for about 10 days being about 900,000 cubic feet per second." (House Doc. No. 798, p. 44, Sec. 8).

28. The present Chief of Engineers, United States Army, Maj. Gen. Edward M. Markham, as late as January 27, 1936, illustrated this volume of water in his testimony before the Senate Committee on Commerce, as follows:

"We faced the problem of dealing with a vast volume of water to be taken out of that river (Mississippi River), most people having no yardstick whatsoever as to what that volume of water is. We say it is 1,000,000 feet, and, in order to produce a yardstick that anybody can readily understand, I would suggest that that is pretty nearly six times all the water that flows over Niagara Falls. It is pretty nearly five

times all the water that flows down the St. Lawrence River to the sea." (Hearings, Senate Committee on Commerce, Jan. 27, 1936, p. 43).

The Chief of Engineers has publicly repeated the substance of this statement many times in public gatherings, the last time being before the National Rivers and Harbors Congress in Washington, D. C., after the 1937 flood, and within thirty days before the trial of this case began on May 10, 1937.

29. Before the House Committee on Flood Control, on February 27, 1934, General Markham, the Chief of Engineers, testified:

"I greatly sympathize with the Boeuf Basin really and truly. But the physical facts that can be verified by any intelligent engineer are these: It is perfectly manifest that something like a million cubic feet of water will have 376 to be handled in that valley \* \* \*. We therefore know that if you pile water below the fuse plug into that lower river you can look for a great disaster, a perfectly plain great disaster. \* \* \* The Boeuf Basin has been put in a very unfortunate situation since the levees below the Boeuf Basin were designed with the theory that we will not permit beyond about 1,800,000 second-feet to pass the fuse plug. \* \* \* I can consent to nothing that increases substantially the flow of water below the fuse plug beyond 1,850,000 second-feet, because it courts disaster." (Hearings, House Committee on Flood Control, February 27, 1934, pp. 24-25).

30. The fuse plug levee lying at the head of the Boeuf Floodway, between the petitioner's property and the main channel of the Mississippi River, was on May 15, 1928, a then standard levee, substantially at the 1914 grade and section. Grade indicates the height of the levee. Section indicates the width and form of a cross-section of the levee. The 1914 grade at Arkansas City represented a height of levee which would not be overtopped until the water in the Mississippi River rose to a gauge of 60.5 on the Arkansas City gauge.

31. For many years prior to 1928 all levee grades and sections along the main stem of the Mississippi River in its alluvial valley were established by the Mississippi River Commission. No Federal funds were contributed to the building of these levees except those which were constructed under the supervision of the Mississippi River Commission, at locations approved by it, on rights-of-way furnished by the local interests, and according to grades and sections fixed and approved by the Mississippi River Commission, given



jurisdiction by federal statute. (See Title 33 U. S. C. A., Secs. 641, 647, 648, 701, 702).

32. All levees on the main stem of the Mississippi River, and on the south bank of the Arkansas River as indicated on the official maps of the Jadwin Plan, except the relief or fuse plug levees, since the passage of the Flood Control Act of May 15, 1928, have been constructed by the United States to the 1928 grade and section. This means that the levees upstream and downstream from the Cypress Creek fuse plug levee, and the levees opposite on the east side of the Mississippi River in the State of Mississippi, are substantially three feet higher than the fuse plug levee and practically twice as large in the cross-section of width and height, thus constructed to insure that the fuse plug levee will be overtopped or crevassed before any of the other levees mentioned shall fail, thus insuring that excess water will leave the main river in the vicinity of Cypress Creek below the mouth of the Arkansas River.

33. No flood has overtopped or crevassed the fuse plug levee since it was completed by local interests in the year 1921, it having been successfully defended and held by the local interests even during the unprecedented flood of 1927. It was relieved by a crevasse in the State of Mississippi substantially opposite the plaintiff's property, referred to as the Mound Crevasse, through which there was an estimated discharge of flood water in 1927 of 500,000 cubic feet per second; and further relieved by crevasses in the south bank of the Arkansas River indicated on the maps as South Bend Crevasse, Pendleton Crevasse, and Medford Crevasse.

34. When the Flood Control Act of May, 15, 1928, was passed, contracts had been let by local interests, and construction was under way, repairing the Arkansas River levee crevasses above mentioned. Since May 15, 1928, the United States has completed the levee on the south bank of the Arkansas River from the vicinity of Pine Bluff to Yancopin near the mouth of the river to the 1928 grade and section as authorized and directed by the 1928 Flood Control Act.

35. No maintenance or work of any kind was done by anyone on the fuse plug levee after the passage of the Flood Control Act of May 15, 1928, and prior to the filing of petitioner's suit on August 11, 1934.

In preparation for the 1937 flood out of the Ohio River, an insignificant amount of work was done at a few low places on the levee toward bringing it back substantially to the 1914

grade and section as authorized by the Flood Control Act of May 15, 1928.

Also, under authority of the Flood Control Act of May 15, 1928, because of caving banks endangering the original fuse plug levee at Cypress Bend, several miles upstream from Arkansas City, during the year 1936 the United States constructed a set-back levee, of the same grade and section as the original fuse plug levee, extending from the outskirts of Arkansas City northward approximately 8 miles. This new set-back levee, constructed long after the petitioner's suit was filed, is now a part of the Boeuf Floodway fuse plug levee as authorized by the 1928 Flood Control Act, being itself a relatively smaller, weaker relief levee than the levees North and South of the fuse plug levee, and relatively lower and weaker than the main stem levee on the East side of the Mississippi River.

36. This fuse plug levee, lying between petitioner's property and the main channel of the Mississippi River, is an essential and vital feature for the flood control of the Mississippi River in its Middle Section under the Flood Control Act of May 15, 1928, being necessary not only for the protection of the remainder of the alluvial valley in this section outside of the Boeuf Floodway, but also essential for the protection of all other Government levees in the Middle Section of the river, and probably beyond, especially the main stem levees on both sides of the river downstream from the fuse plug levee.

37. Raising and strengthening this fuse plug levee to the 1928 grade and section, authorized by the Flood Control Act for other levees, would defeat the Jadwin Plan, and would destroy its purpose that excess flood waters will leave the main river at the fuse plug section in the vicinity of Cypress Creek passing down the selected Boeuf Floodway diversion. The problem of flood control in the alluvial valley would be placed back substantially where it was prior to the passage of the Flood Control Act of May 15, 1928, in that excess waters would escape haphazardly and at entirely unpredictable places with disastrous consequences. Only by depriving the property owners in the Boeuf Floodway of their right of self-defense, formerly exercised by raising this fuse plug levee during flood fights, can the Jadwin Plan be effective. In fact, as well as in law, in this respect these property owners have had taken from them such right of self-defense by the passage of the Flood Control Act of May 15, 1928, and no longer have the right or power to raise or strengthen this fuse plug levee beyond its grade and section which existed

at the time of the passage of the Flood Control Act of May 15, 1928, namely, the 1914 grade, section and strength, which levee must now be overtopped when the water passes a stage of 60.5 feet on the Arkansas City gage. At this time the other main stream levees of the Mississippi River in the Middle Section, and the levee on the south bank of the Arkansas River, will have a freeboard of 3 feet or more of additional levee height.

38. In 1921, local interests, with Government aid and consent, closed the gap in the main line levee at the mouth of Cypress Creek which theretofore had constituted an outlet for flood waters of the Mississippi River. When the opening at the mouth of Cypress Creek was closed in 1921, the present fuse plug levee on the west side of the Mississippi River became a complete, standard levee; and has not since  
380 been either overtopped or crevassed. Since 1921 the plaintiff's property has been protected by this levee from all flood water diverted from the main channel of the Mississippi River, even during the unprecedented flood of 1927.

Therefore, any and all water which may hereafter pass over the plaintiff's property by reason of overtopping or breaching this fuse plug levee will be additional destructive flood waters that will pass over petitioner's property by reason of diversion from the main channel of the Mississippi River as contemplated by the provisions of Section 4 of the Flood Control Act of May 15, 1928.

39. Because of the construction work done by the United States under authority of the Flood Control Act of May 15, 1928, for several years prior to the filing of petitioner's suit her property has been subject to the continuing menace of additional destructive flood waters passing by reason of artificial diversion from the main channel of the Mississippi River, authorized by the Flood Control Act of May 15, 1928, at a place, and in a manner, not theretofore existing.

40. The petitioner has proved by a preponderance of the evidence the material allegations of her petition charging a taking of her property by the United States within the meaning and provisions of the Fifth Amendment to the Constitution of the United States which provides that private property shall not be taken for public use without just compensation.

41. The history and physical facts descriptive of the Boeuf Floodway as recited in the court opinions in the cases of Kincaid vs. United States, 35 Fed. (2d) 235, and 37 Fed.

(2d) 602, and 49 Fed. (2d) 768, are established by the evidence in the present case.

381 42. The Jadwin Plan of flood control in the Middle Section of the Mississippi River as authorized by the Flood Control Act of May 15, 1928, and as constructed by the United States prior to the filing of petitioner's suit, involved an intentional, additional, occasional flooding of petitioner's property and constituted a taking thereof as soon as the Government began to carry out the authorized project. (See *Hurley vs. Kincaid*, 285 U. S. 95, 52 S. Ct. 267, 76 L. ed. 637).

43. The Congress of the United States contemplated, and expressed its intention, that the United States should be liable for the taking of property in the Boeuf Floodway resulting from the passage of the Flood Control Act of May 15, 1928, evidenced by its Committee Reports and congressional debates. (See pp. 83-93 and 211-231, Petitioner's Brief in United States Court of Claims, *Southeast Arkansas Levee District et al. vs. the United States*, No. 42,718).

44. This contemplated and authorized "taking" of petitioner's property occurred January 10, 1929. (See President's letter of approval dated January 10, 1929. Com. Doc. No. 2, 71st Congress, p. 12).

45. The petitioner, Mrs. Julia Caroline Sponenbarger, since January 20, 1927, has been, and at the time of trial continued to be, the absolute owner in fee simple of the SW $\frac{1}{4}$  of the SW $\frac{1}{4}$  of Section 31, Township 12, South, Range 1, West, 40 acres of land lying in Desha County in the State of Arkansas. Plaintiff has been in the actual, open, notorious, continuous, peaceable, exclusive, adverse possession of said tract of land since said date of her Warranty Deed from George Hight and wife, namely, January 20, 1927. The plaintiff's record and actual title to said property is established without contradiction or question.

46. Plaintiff's said property is located approximately one mile and a half west of Arkansas City, Arkansas, abutting Arkansas State Highway No. 4, a paved highway  
382 which at the time of plaintiff's purchase constituted an interstate highway by reason of a ferry operated across the Mississippi River in the vicinity of Arkansas City. This paved, improved State Highway gave plaintiff's property excellent connections with Little Rock, the capitol city of the State, and other points and markets north and south.

47. Petitioner's said property is located near the head of the Boeuf Floodway as created and authorized by the Flood



Control Act of May 15, 1928, about one mile from the nearest point to the fuse plug levee southeast of plaintiff's property, and about seven miles south of Lucca Landing, a point near the upper end of the fuse plug levee in the general vicinity of the former mouth of Cypress Creek (Opposum Fork).

48. For all practical purposes, as contemplated and intended by the Flood Control Act of May 15, 1928, the fuse plug levee at the head of Boeuf Floodway has been in operative condition since approximately the year 1930, ready for operation and use whenever the need therefore might arise as designed by said Flood Control Act. Since approximately the year 1930 the point at which the fuse plug levee would probably have first crevassed, failed or been overtopped was, and at the time of trial continued to be, in the vicinity of said Lucca Landing near the upper end of said fuse plug levee.

49. When the fuse plug levee overtops and crevasses the escaping flood waters from the Mississippi River will wash away a large portion of the fuse plug levee not only down to the bank-full stage (approximately 42 feet on the Arkansas City gage), but will probably, by the enormous force of its released current, scour out a deep hole in the vicinity of the crevasse, commonly called a "blue hole". Blue holes are sometimes washed out as deep as 50 or 60 feet below the ordinary bank surface or elevation.

383 50. When a crevasse occurs, the entire fuse plug levee will be subjected to wave-wash erosion from the floodway side as well as from the river side, making it practically impossible to maintain it.

51. The surface of petitioner's land lies from 20 to 25 feet lower than the flood level at the top of the fuse plug levee; that is, petitioner's land lies from 20 to 25 feet lower than an elevation equivalent to 60.5 feet on the Arkansas City gage.

Immediately before the fuse plug levee overtops and crevasses (unless it crevasses before it overtops), the surface of the water in the Mississippi River, approximately one mile from the petitioner's land at the nearest point, will be flowing more than 20 feet higher than petitioner's land.

52. When the fuse plug levee is overtopped and crevasses in the vicinity of petitioner's land, especially if the breach of the levee is a comparatively short distance upstream from petitioner's property and at the point where the evidence shows it probably will "blow out", the released flood waters from the Mississippi River will flow over petitioner's prop-

erty at a depth of approximately 20 feet, and with a current sufficiently strong to float and wash away all movable improvements on the property. The surface soil will be seriously damaged, and the property subjected to destructive flood effects to which it has never before been subjected. A greater volume of water, and with more destructive current, will flow over petitioner's property than would be true had the Jadwin Plan not been constructed, and more than has ever been true in any previous flood of record.

53. In order for a levee to be safe from breaking from flood waters, it is recognized generally by engineers that the levee must have a freeboard from 3 to 5 feet; that is, the top of the levee should be from 3 to 5 feet above the surface of flood water for the levee to be safe. This is occasion-  
 384 ed by danger of wave-wash from high winds, the striking of the levee by boats or other heavy floating objects, the unexpected sinking or sloughing of the levee, and many other unforeseeable conditions. This fact applies especially to a fuse plug levee which is not watched and maintained, especially at such points where the fuse plug levee, as in the case at bar, is designated, intended and required to break.

The danger point of the crevassing of the fuse plug levee will be reached before the flood waters reach the top of the fuse plug section; and it will be necessary for the inhabitants of the floodway in the vicinity of petitioner's property to move out with all their personal property before the fuse plug levee is actually overtopped or crevasses.

When the fuse plug levee crevasses, and the Boeuf Floodway functions, as is planned and intended by the Flood Control Act of May 15, 1928, the petitioner's property will be subjected to flood water of far greater depth, velocity and duration than ever before.

54. At the time of her purchase, and since, the plaintiff's land was practically all in actual cultivation, well drained and of unusual fertility and productivity. The quality of farming land in this general area is often characterized by the amount of cotton per acre it will produce on an average year. Land which will so produce a bale of cotton per acre is considered the very best land in the territory suitable for agriculture. The plaintiff's property was this type of land, it being generally established that there was none better, not even in the limited arear of the rich alluvial valley of this stretch of the Mississippi River. At the time of its purchase, the nearby town of Arkansas City was a thriving market for agricultural products.

385 55. Even though farm lands in the general vicinity of plaintiff's property were exceedingly fertile and had produced many fortunes in the past, they had little market value until the closing of the gap in the levees at the mouth of Cypress Creek was assured. Then the lands were in great demand and market values increased very rapidly. When these levees were completed in 1921 land values were high, and approximately about the level at which plaintiff purchased her property in January, 1927. At the time of her purchase there was no indication that the property could ever be purchased any cheaper.

56. Plaintiff actually paid on the open market at the time of her purchase of this property the sum of \$100 per acre, and immediately thereafter added improvements to the property amounting to the additional sum of approximately \$25 per acre. The fair market value of the plaintiff's property at the time of her purchase and after said improvements, until the passage of the Flood Control Act of May 15, 1928, was \$125 per acre.

This represented the fair market value of such lands, so improved, in that general vicinity at that period of time.

57. The relatively high market value enjoyed by petitioner's property immediately before its taking under the Flood Control Act of May 15, 1928, is in part accounted for by the fact that Government statistics and graphs show exceedingly large crops to have been raised in this general vicinity during the year 1926, with sharp increases in the price of cotton during the year 1927, reaching more than twenty cents a pound. A very large crop followed by a relatively high price for cotton is reflected in this vicinity by sharp increases in the market value of farming property such as petitioner's.

58. Immediately after the passage of the Flood Control Act of May 15, 1928, and as soon as it became general-  
386 ly known in that locality that the property was located in the bed of the Boeuf Floodway as created and authorized by said Act, by reason of this changed condition the fair market value of plaintiff's property did not exceed \$25 per acre.

59. Since the autumn of the year 1928, when it became generally known that lands in this vicinity were within the limits of the Boeuf Floodway as authorized and designed by the Flood Control Act of May 15, 1928, continuing to the time of the trial, property of the same agricultural possibilities as petitioner's land but in the woods, and in many instances land ready for cultivation, adjoining the petitioner's property and

in the immediate vicinity thereof, had a fair market value, represented by many actual sales, at from less than \$1 per acre to approximately \$10 per acre, the depreciated and destroyed market value so represented being solely on account of the fact that the property was subjected to the flood menace contemplated, designed, intended and authorized by the Flood Control Act of May 15, 1928.

60. By reason of the "taking" of petitioner's said property for the public use aforesaid, she is entitled to "just compensation" which is properly measured by the difference between the market value of petitioner's property before and after such taking, together with interest thereon from the date of such taking. The Court finds from a preponderance of the evidence in this case that said just compensation to this petitioner, so measured, amounts to \$100.00 per acre, or the total sum of \$4,000.00, together with interest thereon at the rate of 6 per cent per annum from January 10, 1929, until paid.

61. Were plaintiff's property given equal protection with the other lands on either side of the Mississippi River in its Middle Section the protection of which is contemplated by the Flood Control Act of May 15, 1928, its fair market value would be not less than \$125 per acre.

387 62. The damage done to petitioner's property solely by reason of the construction work done by the United States under authority of the Flood Control Act of May 15, 1928, amounts to the sum of \$4,000, representing the depreciation and destruction of at least \$100 per acre of the actual market value of petitioner's property.

63. Among other elements of market value which were materially affected by the creation of the Boeuf Floodway, and among other items of petitioner's property which were taken as the result of work done by the United States under authority of the Flood Control Act of May 15, 1928, were the following:

(a) At the time of petitioner's purchase her property enjoyed the confident, assured, justified expectation of speedy and ultimate flood protection against the flood waters of the Mississippi River, equal to that enjoyed by other protected areas in the Middle Section of the alluvial valley of the river. For many years these property owners in the Boeuf Floodway had been taxing themselves, and issuing bonds secured by a lien against their property, for the purpose of building levee protection for their property along the main stem of the Mississippi River and up the south bank of the Arkansas River,



including that section of levee now known as the fuse plug levee. Because of the steady progress of this program, prior periodic floodings of petitioner's property had had no substantial effect on market values in that vicinity. On the contrary, for many years, as the work of levee building progressed, market values in this vicinity steadily increased. When it was finally assured that the levee line across the outlet of Cypress Creek into the Mississippi River would be built, this confident, assured, justified expectation of speedy and ultimate flood protection largely caused the high market values prevailing in the vicinity at the time of petitioner's purchase of her property in 1927.

388 This right to expect ultimate, equal flood protection was substantially destroyed and taken away by the Flood Control Act of May 15, 1928, thus causing the market values of property in the Boeuf Floodway in Desha County, Arkansas, to immediately drop as soon as the effect of said Act became generally known to the property owners in that vicinity.

(b) During the flood of 1927, and all former floods since 1921, the property owners protected by the fuse plug levee had exercised their right to protect their property against the flood waters of the Mississippi River by raising the levee along the river by means of bulwarks, sacked earth, and other temporary works in order to hold their levee until the levees gave way elsewhere and relieved the pressure against what now constitutes the fuse plug levee. Because of better soil conditions these property owners were able to safely hold this fuse plug levee against even the unprecedented flood of 1927 until relief was secured by the breaking of the levee on the opposite side of the river in the State of Mississippi, flooding a very large area of that State. By the passage of the Flood Control Act of May 15, 1928, it will be no longer lawful to raise the fuse plug levee higher than a gauge of 60.5 feet on the Arkansas City gauge whereas the other standard 1928 levees are approximately 3 feet higher. Thus a substantial part of the right of self-defense, or the right to protect her property, was taken from petitioner by said Flood Control Act of May 15, 1928, by constructing works which will result in the failure and crevassing and overtopping of the levee line between petitioner's property and the Mississippi River before other levees of the authorized 1928 grade and section give way. This fact and law immediately affected the market value of plaintiff's property as hereinbefore indicated.

389 (c) As soon as the facts became generally known, all security value to lands in the Boeuf Floodway in Desha

County, Arkansas, was practically destroyed. The Governmental lending agencies, the Federal Land Bank, private banks and private lending agencies, adopted a definite policy of making no further loans on the security of land in this vicinity; whereas, prior to the passage of the Flood Control Act of May 15, 1928, loans were made generally on the lands in this area.

This serious impairment of security or credit value of petitioner's property immediately affected its market value.

(d) Annual crops in this vicinity are largely based on annual crop financing or credits. The agencies formerly affording such credit now withhold such credit each year until all apparent danger of the necessity of using the Boeuf Floodway has passed. Thus all annual crop credit is uncertain and precarious, and no property owner may know any year whether or not he will be able to cultivate his land the following year. Because of this continuing menace each annual crop is in the nature of a gamble. This condition enters into the loss of market value of farming lands in this vicinity.

(e) Shortly after the effects of the Flood Control Act of May 15, 1928, became generally known, all insurance companies cancelled their policies of insurance in Arkansas City and withdrew from the vicinity of petitioner's property. Insurance values in the Boeuf Floodway in Desha County were destroyed. The ability to secure adequate insurance is a valuable part of the market value of property in that vicinity.

(f) The petitioner bought her property for the purpose of building a residence thereon and making it her home, the location being convenient to her business interests in Arkansas City, and the market then there existing. No prudent person would now build a substantial or satisfactory residence on property located within this floodway. The residence and home value of petitioner's property was practically destroyed by the creation of the Boeuf Floodway.

(g) No prudent person would build valuable or permanent improvements of any kind such as are suitable for the best use of fertile agricultural land located as is petitioner's property in the Boeuf Floodway. It would be unwise to make any substantial investment in permanent, worthwhile improvements, because a flood as contemplated by the Flood Control Act of May 15, 1928, is likely to come any year and wash them all away. The right to improve one's property, such as that of the petitioner's, as the owner sees fit, is a valuable right of property directly affecting its market value. This right of the petitioner has been substantially impaired.

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(h) Approximately only 20 percent of the lands in Desha County lying within the Boeuf Floodway as designed by the Flood Control Act of May 15, 1928, were in actual cultivation at the time of the passage of said Act. Practically all of the remainder of said area was cut-over timber land, susceptible to being put in a state of cultivation at a cost of from \$25 to \$40 per acre. At the time of plaintiff's purchase the development of this cut-over timber land was proceeding regularly and rapidly. The development of such wild land increased generally the market values of all property in the vicinity as such improvement and population increased. Such development followed the closing of Cypress Creek gap in 1921. This development, and the legitimate sale of such lands on the open market, was completely changed as the result of the Flood Control Act of May 15, 1928, because the lands could not then be sold on the market within the floodway for the actual cost of putting them into cultivation. Large areas were therefore forfeited to the State, and to various improvement districts, for the nonpayment of taxes because of the loss of these market values. Later such lands were acquired for nominal prices, and a large number of settlers, commonly called donators or squatters, moved into the area and took up these lands without making any substantial investment. All this seriously and adversely affected the market value of petitioner's property.

(i) Shortly prior to the passage of the Flood Control Act of May 15, 1928, a number of active programs were being initiated, and some in actual operation, for the purpose of developing the general vicinity of the petitioner's property by selling lands, both cultivated and cut-over woodland, for general colonization by investors, at substantial prices. Before the passage of the Flood Control Act of May 15, 1928, such cut-over timber land susceptible to cultivation and profitable agricultural use was enjoying an actual market value of approximately \$40 per acre. The creation of Boeuf Floodway destroyed these values in the vicinity of petitioner's property, and therefore also affected the market value of petitioner's property.

(j) For many years the owners of petitioner's property had paid taxes and assessments for the building of levees for flood protection against flood waters in the main channel of the Mississippi River, issuing bonds for approximately \$3,000,000 for investment in permanent levees for permanent flood protection. By the creation of Boeuf Floodway this investment has now been converted into one of only temporary and partial nature, thus affecting the market value of petitioner's property.



(k) As a part of the program of flood protection, in order for the property owners to close the outlet of Cypress Creek with a levee line of the then standard grade and section, it became necessary for the property owners to issue bonds in approximately the sum of \$1,800,000, secured by lien on their lands, the proceeds of which were used for the purpose of constructing a very large drainage system planned by the United States Department of Agriculture, for the purpose of draining the property of surface waters which theretofore had emptied through Cypress Creek into the Mississippi River. This assessment or tax burden, annually paid, was a part of the program for permanent flood protection as well as for property drainage. This investment has been substantially impaired as to the property lying within the Boeuf Floodway, because the first time said floodway is actually used said drainage system will probably be seriously impaired, if not rendered useless. The menace of the repeated use of said floodway increases this hazard. Thus a substantial portion of the investment made by the owners of petitioner's property, which entered directly into its market value at the time of petitioner's purchase, has been lost by reason of the Flood Control Act of May 15, 1928.

(l) The drainage plan for this area submitted by the Department of Agriculture of the United States called for the digging of many lateral ditches emptying into the main canals, thus clearly increasing the desirability of the general vicinity of petitioner's property by perfecting the general drainage of the area. This value has been taken and lost because such work can be done only by issuing bonds for large amounts for such purposes, and it is no longer possible to sell bonds the security of which can be based only on property lying within the limits of this floodway created by Federal law.

(m) The market value of farm property is directly affected by its proximity and accessibility to suitable and thriving markets. Arkansas City constituted such a market for the petitioner's property at the time of its purchase. Because of the creation of the Boeuf Floodway, and as a direct result of the passage of the Flood Control Act of May 15, 1928, Arkansas City as a market has been lost, the town and all values in said city have been demoralized and its population dissipated. This has directly affected the market value of petitioner's property.

(n) Since the creation of the Boeuf Floodway, that portion of State Highway No. 4 which runs along the entire front of petitioner's property has been practically abandoned as an [interstate] road, and is no longer maintained by the State

authorities as such, and is rapidly deteriorating, being temporarily patched from time to time by the State authorities anticipating the destruction or deterioration of the road by the use of the floodway as intended by the Flood Control Act of May 15, 1928. This change of highway and transportation facilities adversely affects the market value of petitioner's property.

(o) At the time of the purchase of petitioner's property, it was near excellent schools located in the then thriving village of Arkansas City. As the result of placing Arkansas City on the far, riverside of Boeuf Floodway, the school revenue and population have so decreased that no longer are the schools and educational advantages accessible which existed at the time of petitioner's purchase of her property, and which affected the market value of her property.

(p) Because of the large amount of tax delinquencies and property abandonment in the limits of the Boeuf Floodway in Desha County, Arkansas, the county has lost such large amounts of revenue that it is no longer able to furnish many of the normal governmental agencies which give value to farm property, such as United States County Agents, Health Nurses, bridge building, etc. Thus, property owners who retained their property, as the petitioner has done, are required to pay for such governmental agencies in addition to their regular taxes, thus increasing the tax burden of such property as the petitioner's, and thus in turn affecting its desirability and market value.

394 (q) The flood menace to petitioner's property because it is within the limits of the Boeuf Floodway is a continuous one, the time of the use of said floodway being entirely unpredictable. No authority can assert with any confidence what year years the floodway will be used. The use of the floodway is a threat not only to property values but even to family health and life. A purchaser of property for home and family use, or for active farming operations, looks to future health conditions and such contingencies as flood menaces. The usual purchaser will not buy property which is not only threatened, but practically assured, of floods from time to time. This decreases the market value of property such as petitioner's on the floor of the floodway.

(r) By the passage of the Flood Control Act of May 15, 1928, and the authorized acts of its agents thereunder and thereafter, the United States has impressed a servitude or easement upon the petitioner's property, being the right to

flood the petitioner's property in such volume and at such times as may be necessary within the provisions of the Jadwin Plan. This fact actually invades to a certain extent the Title of the petitioner to her property. No longer does she enjoy the exclusive right to use her property in any way she sees fit, and to dispose of the entire and complete title to her property. Any conveyance by the petitioner after the passage of the Flood Control Act of May 15, 1928, was necessarily subject to the terms, provisions and consequences of said Act.

64. The Mississippi River in times of flood carries in suspension large quantities of silt, sand and mud, as well as floating vast quantities of debris of various kinds, including logs, trees, and heavy trash. Much of all this will be carried into the Boeuf Floodway when it is flooded as designed by law. Much of the land between petitioner's property and the point where the fuse plug levee will most likely first crevasse has been cleared of timber, and the topography is such that the flood water will course freely through that section of the floodway carrying large quantities of such debris, silt, sand and mud to the petitioner's property, probably either seriously eroding the petitioner's property by destructive currents, or else depositing on the petitioner's property large quantities of such debris. There will also be a tendency either to scour out and destroy the drainage ditches which serve the petitioner's property, or else fill up the same with silt, sand, mud, debris and soil eroded by the current in the floodway before reaching petitioner's property. This constant menace seriously impairs the market value of petitioner's property.

65. It is to be reasonably apprehended that whenever the Boeuf Floodway goes into operation, and functions as is designed by the Flood Control Act of May 15, 1928, the additional, destructive flood waters diverted into it from the main channel of the Mississippi River will either destroy, or seriously impair, damage, deteriorate, wash out or undermine the houses, buildings, fences, ditches, roads, bridges, and crops on the petitioner's property, and in that vicinity, thereby interrupting for an indeterminate length of time the use of the property, interfering with access to or egress from the property, and will greatly endanger any and all life which may be left on the property when the flood water comes.

Army Engineers testifying before Congressional Committees frankly admitted that no prudent person would build a residence within the limits of the Boeuf Floodway; and that

dwellings for man or beast would not be safe during flood times unless such dwelling were built on stilts 20 feet high, as is sometimes done by the natives in the flood areas of the Phillipine Islands.

396 66. Since the petitioner's property has been placed in the Boeuf Floodway as a result of the Flood Control Act of May 13, 1928, desirable tenants have avoided the property in the vicinity of petitioner's land because of the flood menace, so that her land has been rendered less profitable and more unsuitable for renting to desirable or profitable tenants.

That the area is being overrun with squatters or donators who come in as scavengers after destruction and take up abandoned lands without the necessity of any substantial investment, does not tend to enhance the market value of petitioner's property.

67. The general economic depression which affected the country at large, beginning with the year 1930, does not account for any of the loss of market value to petitioner's property hereinbefore referred to, because the petitioner's property had lost its market value as hereinbefore recited many months before the general depression of 1930 began. While general property values elsewhere were at a peak during the boom prices and inflation of 1929, the petitioner's property and other property in that vicinity in the Boeuf Floodway had lost its market value as hereinabove stated. There was not enough value left to be seriously affected by the later depression. One cannot kill a dog already dead.

Furthermore, the passing of the general depression, and the return to normal values and prices of farming properties generally in protected areas has not, and will not, bring back the market value of the petitioner's property or other property in that vicinity on the floor of the Boeuf Floodway.

Therefore, under the peculiar facts of the case at bar, the general economic conditions of the country elsewhere have played, and will play, no important part. They offer  
397 no explanation whatever of petitioner's special and peculiar loss.

68. Much testimony was offered relative to the tax burden and bonded indebtedness of such of the area affected by the Boeuf Floodway. This evidence is immaterial as to the petitioner's property, and merely tends to confuse the issue. No tax burden has increased since the petitioner bought her property January 20, 1927. No bonded indebtedness affecting



this property has been increased since plaintiff bought her property. Petitioner's property had a fair market value of \$125 per acre notwithstanding its tax burden and the bonded indebtedness affecting it. Had the tax burden been substantially lighter the market value would probably have been higher, but no part of the loss of market value hereinabove referred to can be justly attributed to the tax burden or bonded indebtednesses affecting the property. The values mentioned actually existed in spite of those burdens, and the market value of petitioner's property was lost regardless of those burdens.

69. The petitioner has paid all taxes and assessments maturing against her property to the date of the trial.

70. While the petitioner's property had many times been subjected to overflow in previous reported floods, these floods prior to the passage of the Flood Control Act of May 15, 1928, came from points far distant from the plaintiff's property and rose slowly, quietly, and without any destructive currents over the petitioner's land, gradually subsiding as the flood passed, leaving on petitioner's property a deposit of silt enriching the soil. In fact, all of the property in this vicinity has been built up through ages past in this way, which accounts for the great fertility in this alluvial valley.

These early floods that came before there was any fixed plan for closing the Cypress Creek gap outlet of the Mississippi River did prevent the affected lands from devel-

oping any substantial market value. However, when

the plan for closing this gap was developed and became generally known, then no longer did the floods seriously affect the market values of this property because the market values involved grew and were based on the expectancy of closing the gap resulting in the ultimate, speedy protection of the lands from further overflow. Bonds were easily sold for the purpose of drainage and levee works based alone on security values in this area because it was generally understood the property would soon be completely protected.

Now, however, by reason of the passage of the Flood Control Act of May 15, 1928, the situation is entirely changed. Hereafter, when the fuse plug levee at the head of the Boeuf Floodway fails as is intended and contemplated by the Jadwin Plan, petitioner's property will be subjected to the destructive onrush of head waters from the crevasse, with disastrous effects on all property in its immediate pathway, and all further substantial security values for further internal improvements have been destroyed.

71. The petitioner's property will be subjected to head water flooding through crevasses in the upper fuse plug levee until the fuse plug levee is reconstructed, if at all, after such break. The crevasses cannot be closed by rebuilding the fuse plug levee until long after the flood season of the particular year when the crevasse occurs. Therefore, after the first breach of the fuse plug levee, thereafter all over-bank-full stages of the river (approximately 42 feet on the Arkansas City gage) will again put water over the petitioner's property, until such time as the gap in the levee is repaired.

No provision is made in the Flood Control Act of May 15, 1928, nor in the Jadwin Plan, nor have any appropriations been made, for the closing of such crevasses.

399 72. The United States has paid for flowage rights in the Bonnet Carre Floodway in the lower section of the Mississippi River, and in the Birds Point-New Madrid Floodway in the upper section of the Mississippi River, two of the floodways authorized and created by the Flood Control Act of May 15, 1928. The United States has not paid, nor offered to pay, anything to the petitioner; nor has any condemnation suit been brought against the petitioner, or her property, under the provisions of the Flood Control Act of May 15, 1928, or any other law.

73. The Boeuf Floodway cannot operate in the manner intended by the Flood Control Act of May 15, 1928, unless the fuse plug levee at its head is kept approximately 3 feet below all other 1928 levees. As the result of construction work done under authority of the Flood Control Act of May 15, 1928, the United States has accomplished this purpose. For all practical purposes in the matter of relieving the main channel of the Mississippi River in its Middle Section of excess water beyond the safe capacity of the levees below the fuse plug, the Boeuf Floodway is, and approximately since the year 1930 has been, complete and ready for operation and use whenever the need therefor might arise. The United States has acquired and taken every right needed for this project and purpose, and the property of the petitioner has to all intents and purposes since approximately 1930, been subjected to every possible use contemplated by the taking. This is a taking within the meaning and intention of the Fifth Amendment to the Federal Constitution, and entitles the petitioner to compensation in this suit. (See *U. S. vs. Yazoo & M. V. Ry. Co.*, 4 Fed. Supp. 366; *Jacobs vs. U. S.*, 45 Fed (2d) 34; 63 Fed. (2d) 326; 290 U. S. 13, 54 S. Ct. 26, 78 L. ed. 142; *Kincaid vs. U. S.*, supra).

74. Formerly there was a fair chance of levee lines breaking elsewhere. Now the fuse plug levee alone must give way.

400 The value of all protected lands in the alluvial valley of the Mississippi River has thereby been immeasurably increased; and all market values of real property in the floodway have been correspondingly decreased.

75. The Flood Control Act of May 15, 1928, adopts a plan of flood control which definitely sacrifices the property on the floor of the Boeuf Floodway for the better protection of vast areas of other property in the alluvial valley of the Mississippi River. Neither the Jadwin Plan, nor any other construction done or authorized by the Flood Control Act of May 15, 1928, was intended to result in any benefit whatever to the petitioner's property near the head of the Boeuf Floodway, nor has any such authorized construction contemplated by said Act resulted in any such benefit to petitioner's property, nor will any such benefit result to petitioner's property.

The difference in the market value of petitioner's property before and after the taking is the true, complete and exclusive legal measure of just compensation to which she is entitled.

76. Past experience has shown that due to a multitude of and constantly changing, unforeseen and unpredictable factors and conditions, the floods of the Mississippi River in the past can furnish no definite formula or rule for its future floods.

It is impossible to know or predict in what year or years, or at what period of any year, a flood will occur in the future; or how many crests or waves the same flood will have; or what will be the volume, extent, or period of duration of any flood, or of any crest thereof; or how frequently major floods will occur; or whether they will occur in one or more successive years; or how often they will exceed 60.5 feet on the Arkansas City gage.

No two floods seem to have the same characteristics, but each flood is unique as to type, method of formation, 401 results, method of fighting, and threat to levees. Past official estimates for future floods have uniformly proved insufficient.

These uncertainties add largely to the petitioner's damages, and account in a large measure for the loss of market value which must be taken into account in adequately measuring the just compensation which must be awarded to petitioner.

The flood menace to petitioner's property is a constant, continuing one, and has existed potentially at all times since material construction has progressed on the Jadwin Plan as authorized by the Flood Control Act of May 15, 1928.

77. Much evidence was offered by the United States relative to experimental work done by the Government in the artificial digging of a number of cut-offs below the mouth of the Arkansas River and above the mouth of the Red River which at the date of the trial had shortened the bank channel of the river between these points approximately 100 miles. The flood channel, representing the distances between the tops of the levees on either side of the river, has not been shortened by any substantial change of levee locations in this stretch of the river. Geographically it is still the same distance between levee lines from the mouth of the Arkansas River to the mouth of the Red River, or from Arkansas City to Angola.

78. These cut-offs were not contemplated as a part of the Jadwin Plan, but, on the contrary, were expressly rejected as being too uncertain and threatening to warrant adoption. (Doe. 90, Sec. 69).

79. The evidence offered by the United States as to the ultimate effect of these cut-offs was based almost entirely upon the observed results of one flood, namely, that of 1937, coming out of the Ohio River. This was an unusual flood, sometimes characterized as a "flash flood", or a freak flood. It would not be safe to predict at this time the ultimate effects of this cut-off program when the same has been completed; but, on the contrary, a long period of years, 402 and testing by a number of different major floods, will be necessary before proper appraisal can be given as to the ultimate beneficial or detrimental effects of these cut-offs, as they affect the flood hazard to petitioner's property.

80. It is already established that the observed beneficial effects of these cut-offs, which apparently lowered the flood gage at Arkansas City during the 1937 flood, decrease progressively as the flood stage rises above the bank-full stage of the river. Petitioner's property is not seriously menaced until the flood stage approaches the gage of 60.5 on the Arkansas City gage—the top of the fuse plug levee. At that gage the beneficial effects of the cut-offs will be so greatly decreased as to not be measurable at the present time.

81. This program of trial cut-offs was initiated by the President of the Mississippi River Commission after June, 1932, long after the petitioner's property had been "taken"



by the United States. It was a complete reversal of the former policy of the Mississippi River Commission, and against the general consensus of opinion of the engineers who had studied and written on the problem for 50 years or more, which former policy had been to prevent even natural cut-offs by building dikes along the necks of peninsular loops in the river. The United States definitely condemned and rejected this program of cut-offs for a number of years after the passage of the Flood Control Act of May 15, 1928.

82. It is the tendency of a river in an alluvial valley like the Mississippi to maintain a fairly constant length in its main channel. From the years 1722 to 1884, inclusive, there were 20 natural cut-offs of the river similar to those artificially created since 1932. The aggregate reduction in river length caused by 19 of these cut-offs between 1776 and 1884, inclusive, was 228 miles. Notwithstanding this length of Mississippi River channel so actually cut off, the river, acting under the influence of natural forces, had regained its length to the extent that in 1929 its length from Cairo to Baton Rouge was only 2.6 miles shorter than its length between these points in 1765.

Although man's efforts have hindered channel shifting, they have by no means controlled it; nor is complete control possible except in the comparatively remote future when the extensive revetment and dredging program necessary for complete control becomes economically justified. The length of the river channel is the complex resultant of many factors, among which the principal are slope, volume, velocity of discharge and the character of bank soil.

It has not yet been definitely proved that the present cut-off program of the Mississippi River Commission will ultimately and permanently relieve the flood menace to petitioner's property.

83. No witness produced by the United States was authorized to speak authoritatively for the Government as to the anticipated results of this cut-off program. On the contrary, each of the technical witnesses produced by the defendant on the subject admittedly expressed only his own personal views. The failure of the defendant to produce such witnesses as Major General E. M. Markham, Chief of Engineers, Brigadier General H. B. Ferguson, Corps of Engineers, President of the Mississippi River Commission, and Lieutenant Colonel Lunsford E. Oliver, District Engineer, at Vicksburg, to testify on this point, raises the presumption that the testimony of such witnesses would not have supported the defense on this point tendered by the Government.

On the contrary, the evidence establishes the fact that the Chief of Engineers, Maj. Gen E. M. Markham, who does speak with authority for the defendant, in public and official addresses and testimony continued long after the 1937 flood and to within 30 days preceding the trial of the present case, notwithstanding the cut-offs completed and contemplated, expressed the conviction that a floodway on the west side of the Mississippi River, south of the mouth of the Arkansas River, is still a vital, essential and fundamental part of any practical program for flood control in the Middle Section of the Mississippi River, and that this "lower part of the Mississippi Valley will continue to be in jeopardy of a repetition of the 1927 disaster unless 1,000,000 cubic feet per second of excess water is taken out of the river on its west side, a flow five or six times that of Niagara Falls at ordinary stages."

In fact, the Chief of Engineers, speaking authoritatively for the United States under the provisions of the Flood Control Act of May 15, 1928, as well as under the provisions of the Flood Control Act of June 15, 1936, continues to publicly express the conclusion of the Corps of Engineers of the United States Army that a floodway west of the river in its Middle Section south of the mouth of the Arkansas River is vital and necessary, notwithstanding the cut-off works done in the cause of, and for the purpose of, channel stabilization.

84. No witness offered by the defendant advised, advocated, or consented to the elimination of the fuse plug levee by raising and strengthening it to the 1928 grade and section as authorized by the Flood Control Act of May 15, 1928, and as continued by the Flood Control Act of June 15, 1936. Only by building the fuse plug levee to the standard grade and section of all other levees can the market value of plaintiff's property be restored.

85. The preponderance of the evidence relative to the ultimate effect of the present program of the Government in making artificial cut-offs in the river, establishes that:

405 (a) The effects of said cut-offs, as they existed at the time of the trial of this cause, are probably only temporary; and

(b) They are local in their effect, changing from time to time in the course of nature as the enormous force of the river current operates; and

(c) That no measureable effect of these cut-offs had been observed on the gage at the mouth of White River at the time of the trial; and

(d) That the beneficial effects of cut-offs decreases progressively and parabolically as the flood stage rises above the bank-full stage; and

(e) That the beneficial effects of the cut-offs below the latitude of petitioner's property had already decreased between the high waters of 1936 and 1937, indicating a channel deterioration below the cut-offs; and

(f) That the cut-offs tend to pile up water below them, due to the increased velocities of the stream while running through cut-offs, thus lowering the flood plane most through the cut-off itself where the current drops most rapidly; and

(g) That these increased velocities through the cut-offs not only endanger the levees below where the water is retarded and piles up, but causes serious erosion and threatens bank caving where the velocity of the current is increased; and

(h) That the observed differences in discharge capacity, and in the Arkansas City gage readings, since the development of the cut-offs has not been strikingly different from the differences in discharge capacity and gauge readings of other floods of record in the past performance of the river during different flood stages prior to the establishment of cut-offs; and

406 (i) This cut-off program has not materially affected the market value of the petitioner's property.

86. The development of Caulk's Neck cut-off, upstream from the latitude of petitioner's property and below the mouth of the Arkansas River, will greatly increase the velocity of the main channel of the river at that point, directing the current directly against the fuse plug levee in the vicinity of Lucca Landing; shifting the temporary effect of the lower cut-offs upstream, and increasing the probability of the failure of the fuse plug levee in the vicinity of Lucca Landing, immediately upstream from the petitioner's property.

87. When the crest of the 1937 flood reached the latitude of the mouth of the Arkansas River, and the latitude of petitioner's property, the reservoir capacity of the lower channel of the Mississippi River throughout to its mouth at the

Gulf of Mexico, and the reservoir capacity of the back-water area extending upstream from the mouths of the Arkansas and White Rivers, were relatively empty. These factors were material in enabling the fuse plug levee to carry the crest of the 1937 flood past its length.

Had the Arkansas and White River Basins contributed to the crest of the 1937 flood a volume of water comparable to that which was contributed to the crest of the flood in 1927, the fuse plug levee would have been overtopped and crevassed and the Boeuf Floodway would have functioned as planned and intended by the Flood Control Act of May 15, 1928.

88. The 1937 flood crest out of the Ohio River valley reached a gage of approximately 54 feet at Arkansas City with all the cut-offs functioning. Had the Arkansas and White Rivers contributed approximately 1,200,000 cubic feet per second as they did in 1927 the gage would have been raised 24 feet additional at Arkansas City, thus, if confined, reaching a stage of 78 feet, or 17.5 feet above the top of the fuse plug levee.

407 89. Since the cut-offs below the latitude of petitioner's property have been developed, a new cycle of erosion of the river banks has begun, probably due to the increased current caused by these cut-offs. For instance, since the opening of Ashbrook cut-off, the first cut-off below Arkansas City, the erosion during the flood of 1937, the first flood volume since the opening of said cut-off, was so destructive that the revetment on the west side of the Mississippi River in Yellow Bend, a short distance below Arkansas City, was seriously impaired and practically washed away. This revetment had just been completed by the United States at a cost in excess of \$500,000.

90. The enormous increase of erosion caused by the increased velocities of the cut-off system, carried by the river in the form of suspended sedimentation until the current of the river is retarded below the cut-offs when deposition of silt occurs, results in the deterioration of the lower channel and increases the danger to the levees below the cut-offs for which no anticipation or preparation is made by authority of the Flood Control Acts of either May 15, 1928, or June 15, 1936, each of which Acts contemplates relief by means of the diversion floodways west of the main channel of the Mississippi River, carried laterally, below the mouth of the Arkansas River.

91. For cut-offs to remain effective continuous dredging must be maintained and proper revetment works must be con-



structed and maintained. Former appropriations have all been expended. No present law or appropriations guarantee such necessary continuous dredging for maintaining cut-offs. No law requires that the experimental cut-offs be kept in working condition. The plaintiff has no assurance that these cut-offs will become a permanent part of the flood control program.

92. Under the provisions of the Flood Control Act of May 15, 1928, and as modified by the additional provisions of the Flood Control Act of June 15, 1936, the lands on 408 the floor of the authorized floodways and back-water areas are sacrificed for the protection of the balance of the alluvial valley of the Mississippi River.

93. The levee grades on the south bank of the Arkansas River between Pine Bluff and Yancopin, and also on the main stem of the Mississippi River between Helena and Rosedale, will be endangered if the diversion in the vicinity of Cypress Creek as authorized by the Flood Control Act of May 15, 1928, is moved downstream by reason of the cut-offs.

94. No appropriations have as yet been made for the purpose of executing the provisions of the Flood Control Act of June 15, 1936. The flowage rights required by the provisions of the Flood Control Act of June 15, 1936, have not been acquired by the United States. There is no assurance that these necessary flowage rights can be acquired within the limits fixed by the Flood Control Act of June 15, 1936.

The so-called Markham Plan, adopted by the Flood Control Act of June 15, 1936, modifying the Jadwin Plan, so far is merely a paper plan, and there is no assurance that it will ever be actually constructed so as to replace the presently existing Jadwin Plan.

95. Should the Markham Plan as authorized by the Flood Control Act of June 15, 1936, ever become a reality by actual construction, it would have no material effect on the flood menace to petitioner's property because her property would still be in the upper or head end of the Eudora Floodway, protected from diversion of additional, destructive flood waters from the main channel of the Mississippi River only by the same fuse plug levee which now exists.

96. No adequate just compensation to petitioner is possible 409 under the provisions of the Flood Control Act of June 15, 1936, adopting the Markham Plan of flood control on the Mississippi River (Overton Bill). If and when the modifications authorized by the 1936 Act become

effective, the petitioner's property will still be near the head of the floodway, south of the Arkansas River and west of the Mississippi River (the Eudora Floodway).

The 1936 Act authorizes and contemplates the acquiring of flowage rights based on market values at the time such rights are acquired by the United States. The fair market value of petitioner's property was substantially impaired and destroyed when her property was placed in the Boeuf Floodway as a result of the Flood Control Act of May 15, 1928. Values in the vicinity of petitioner's property are now nominal as compared to what they were before being placed in the Boeuf Floodway. Therefore, under the provisions of the Flood Control Act of June 15, 1936, the United States would be authorized to pay, and the petitioner could demand, only the existing nominal values and damages.

Thus the passage of the Overton Bill, conditionally authorizing modifications of the Jadwin Plan, can afford the petitioner no adequate relief, nor secure to her just compensation for her property which had been "taken" by the United States many years before.

The award by the court in the present action will preclude the plaintiff from claiming any additional flowage compensation under the provisions of the 1936 Act.

97. The tentative plans being worked out by the defendant United States, authorized by the Flood Control Act of June 15, 1936, as shown by one of the maps prepared by the Government Engineers filed as an exhibit in the case, include the construction of a spillway at the upper end of the fuse plug levee above Arkansas City, as an entrance to the upper end of the Eudora Floodway at a position in the general vicinity of the petitioner's property, upstream from and near the petitioner's property. Should such a spillway be constructed the petitioner's property would be made to bear the brunt of flooding whenever the upper section of the Eudora Floodway begins to function, just as is planned and authorized by the Flood Control Act of May 15, 1928, for the Boeuf Floodway.

98. The construction of the Markham Plan as contemplated by the Flood Control Act of June 15, 1936, would afford no additional protection to plaintiff's property, but would leave it in substantially the same condition as that under which it now rests. Such modifications of the Jadwin Plan would neither increase its present flood hazards nor give it any further advantage insofar as its flood menace is concerned.

99. The passage of the Flood Control Act of June 15, 1936, (called the Overton Bill, adopting the so-called Markham Plan), has no appreciable effect on the market value of the petitioner's property involved in this action.

100. (a) By Acts of the General Assembly of the State of Arkansas, the plaintiff's property is subject to an annual tax of 30c per acre due the Southeast Arkansas Levee District. The petitioner has paid all taxes and assessments due to the Southeast Arkansas Levee District to the time of trial.

(b) The Southeast Arkansas Levee District was placed in receivership because of default in the payment of its matured bonded indebtednesses by order of this United States District Court for the Western Division of the Eastern District of Arkansas, on February 5, 1932, Mr. Grady Miller being then appointed as Receiver and still serving as such at the date of the trial.

(c) Petitioner's property is also located in the Cypress Creek Drainage District created by Acts of the General Assembly of the State of Arkansas, against which has been charged or assessed a benefit in favor of said Cypress

411 Creek Drainage District in the sum of \$800, payable in annual installments as the result of annual levies. The petitioner has paid on said assessment on her property involved in this action the sum of \$480, being all thereof which has become due. There remains unmatured but outstanding of said assessed benefits the sum of \$320. It is not yet known what proportion of said remainder will be levied and collected by said District.

(d) On January 15, 1930, A. H. Rowell and W. R. Humphrey were appointed by this United States District Court as Receivers for said Cypress Creek Drainage District and remained in charge of the affairs of said District until April 9, 1937, when the affairs of the District were returned to the management and control of its Board of Commissioners by proper order of this United States District Court. At that time its indebtedness had been refunded as the result of a loan made by the Reconstruction Finance Corporation, and the issuance of new bonds resulting in the cancellation of a very large proportion of the then outstanding bonded indebtedness of said Cypress Creek Drainage District.

(e) At the time of the trial there were no past due taxes, assessments or liens of any kind or character against the petitioner's property; and she was the absolute owner in fee simple.

101. The petitioner, Mrs. Julia Caroline Sponenberger, is entitled to recover judgment against the United States in the sum of \$4,000, together with interest thereon at the rate of 6 per cent per annum from January 10, 1929, until paid, and for all costs in this action by her incurred.

412 Whereupon the plaintiff requested the Court, separately presenting each sub-division and each paragraph of each numbered request, separately and severally, to declare the following:

(Conclusions of Law Requested by Plaintiff.)

#### Conclusions of Law.

1. By the passage of the Flood Control Act of May 15, 1928, (Public—No. 931—70th Congress; 45 Stat. 534; Title 33 U. S. C. A., Secs. 702a—702m, inclusive), the Congress adopted a plan of flood control in the alluvial valley of the Mississippi River which involves an intentional, additional, occasional flooding of certain lands in designated floodways, including property owned by the petitioner in the Boeuf Floodway, which constituted a taking of certain property rights of the petitioner for flowage purposes as soon as the Government began to carry out the project authorized. (Hurley vs. Kincaid, 285 U. S. 95, 52 S. Ct. 267, 76 L. ed. 637).

2. One whose lands may be subjected to occasional flooding as a direct consequence of the construction by the Government of a floodway to relieve the channel of a river in times of high water may, as soon as work on the project is begun, maintain an action at law under the Tucker Act against the United States, as upon an implied contract, for such compensation as might have been awarded had condemnation proceedings been instituted by the Government. (Hurley vs. Kincaid, supra.).

3. The Jadwin Plan of flood control is the alluvial valley of the Mississippi River as adopted by the Flood Control Act of May 15, 1928, insofar as it created and established the Boeuf Floodway, became definite and fixed for the first time as a matter of law when the President, pursuant to the authority of Section 1 of said Flood Control Act, approved the Boeuf Floodway and authorized condemnation of land for rights-of-way for the proposed protection levees in the Boeuf basin on January 10, 1929, when the statute of limitation prescribed by the Tucker Act (Jud. Code, Sec. 24 (20); Title 28 U. S. C. A., Sec. 41, Subd. (20), p. (625) first began to run against the petitioner's claim and



cause of action against the United States. (See petitioner's brief in Court of Claims, pp. 130-133 and p. 136).

4. As a matter of law, the taking of petitioner's property became final and irrevocable when the United States filed its condemnation suit in the Boeuf basin on July 1, 1929. The dismissal of that condemnation suit, involving the dissolving of the injunction secured when the suit was filed, long after the petitioner's action had been begun, was too late to affect her rights in the present case. (See *United States vs. Yazoo & M. V. Ry. Co.*, 4 Fed. Supp. 366). When the implied promise to pay has once arisen a later denial by the Government of its liability to make compensation does not destroy the right in contract, nor convert the act into a tort. (*Tempel vs. United States*, 248 U. S. 121, 39 S. Ct. 56, 63 L. ed. 162, at p. 165).

5. Section 4 of the Flood Control Act of May 15, 1928, which provides: "The United States shall provide flowage rights for additional destructive flood waters that will pass by reason of diversions from the main channel of the Mississippi River", creates and establishes as a matter of law the right of the petitioner to recover just compensation in her present action.

6. As a matter of law the petitioner, and other property owners similarly situated and likewise affected, prior to the passage of the Flood Control Act of May 15, 1928, had the right to protect her property from floods from the main channel of the Mississippi River by the building of levees or dikes to keep back the flood waters without being responsible to her neighbors or property owners on the opposite side of the stream, a right which was exercised in the construction of the riverside levee which, by the provisions of the Flood Control Act of May 15, 1928, has now become a fuse plug levee at the head or entrance of the Boeuf Floodway. This right of the petitioner was materially impaired, if not destroyed, by the adoption of the Jadwin Plan by the passage of the Flood Control Act of May 15, 1928. (Kincaid vs. United States, 35 Fed. (2d) 236).

7. Riparian proprietors are protected by law from undue interference or burden created by obstructions to the natural flow of rivers by deflections in river's course, or by any other act limiting the right to enjoyment of the natural flow. (Kincaid vs. United States, 35 Fed. (2d) 236).

8. The power of eminent domain in connection with improvements in navigable streams in aid of navigation and for the flood control of navigable streams is complete in the

Federal Government; and cannot be enlarged or diminished by powers of eminent domain of affected States. (Kincaid vs. United States, 35 Fed. (2d) 236; United States vs. Hess, 70 Fed. (2d) 142; Honck vs. United States, 201 Fed. 862; Cape Girardeau, etc. Co. vs. Jordan, 201 Fed. 868; 20 Corpus Juris, p. 530, Sec. 18, and numerous decisions there cited).

9. Under the Flood Control Act of May 15, 1928, (Title 33 U. S. C. A., Sections 702a-702m), and Sections 13, 14, 16 and 17 of the Rivers and Harbors Act of 1899 (Title 33 U. S. C. A., Sections 407, 408, 411-413) made applicable by Section 9 (Title 33 U. S. C. A., Sec. 702i), if conditions of carrying out plans of the Mississippi River flood control will result in diversion of additional flood waters from the main channel of the river in times of flood, the owners of lands over which such waters will flow must be compensated for such flowage rights. (Kincaid vs. United States, 37 Fed. (2d) 602).

10. Where the Government plan of flood control, under the provisions of the Flood Control Act of May 15, 1928, contemplated the diversion through one basin or floodway 415 of more waters than had ever before passed down such basin in times of flood, the diversion of such "additional destructive flood waters" was contemplated, in the meaning of the statute, requiring the United States to acquire by condemnation such flowage rights. (Kincaid vs. United States, 37 Fed. (2d) 602).

11. The fact that the Jadwin Plan of flood control of the Mississippi River provides for raising main levees several feet, so that the capacity of the river will be greatly increased, and it will carry greater volumes of water than ever before, so that actually even less water may be diverted or escape from the river in times of flood than has been the case in the past, does not require the conclusion that no additional waters will be diverted over private lands, nor render it unnecessary under the Flood Control Act of May 15, 1928, for the United States to acquire flowage rights in the designated floodways by condemnation; these statutes contemplating compensation to landowners whose lands were intended to be used as floodways in times of flood, and not that such landowners should bear the whole burden for the benefit of protected lands, such statute having been enacted having in mind conditions as they existed in 1927. (Kincaid vs. United States, 37 Fed. (2d) 602).

12. When the United States departed from its policy of building levees and other public works for the purpose of commerce and navigation alone, and expressly entered the field

of controlling floods for the protection and reclamation of private lands, it engaged in activities which made it responsible under the Fifth Amendment of the Federal Constitution for the invasion of private rights. (Kincaid vs. United States, 37 Fed. (2d) 602).

13. As a matter of law, it will not be assumed that the Congress, by passing the Mississippi River Flood Control Act of May 15, 1928, intended to violate the Fifth Amendment to the Constitution by taking private property for public purposes without just compensation. (Kincaid vs. United States, 37 Fed. (2d) 602).

14. The owner of property subject to overflow waters of either navigable or nonnavigable streams is entitled to have them continue in their natural state, without burden or hindrance imposed by artificial means, and no public easement beyond the natural one can arise without grant or dedication save by condemnation, with appropriate compensation for the private right. (Kincaid vs. United States, 37 Fed. (2d) 602).

15. The owner of land subject to overflow by the Mississippi River had the right to build levees or dykes along the banks of the stream to keep the water off his property, without responsibility to those above or below, so long as he did not change or impede the natural course of the stream; and the legal situation is not changed because the dykes or levees, as increased in height and extended throughout the length of the Mississippi River, were unable to hold the river within its channel at flood stages. (Kincaid vs. United States, 37 Fed. (2d) 602).

16. The appropriation of flowage rights by the United States under authority of the Flood Control Act of May 15, 1928, necessitated compensation, a right of the property owner which was complete with the construction of the work designed to direct the waters on his land, and the right to compensation was not postponed until the lands were actually occupied by diverted waters. (Kincaid vs. United States, 37 Fed. (2d) 602; 49 Fed. (2d) 768).

17. The just compensation to which the owner of property taken for public purposes is constitutionally entitled is the market value of the property at the time of the taking contemporaneously paid in money. (Olson vs. United States, 292 U. S. 246, 54 S. Ct. 704, 78 L. ed. 1236).

18. In fixing the compensation to be paid on condemnation of an easement of flowage (or in suit for the recovery of such compensation if no condemnation has been had),  
 417 no reduction is to be made because of diminution of value caused by an unauthorized flooding of the property. (Olson vs. United States, supra).

19. The sum required to be paid to the owner of land taken for public use does not depend upon the uses to which he has devoted his land, but is to be arrived at upon just consideration of all the uses for which it is suitable; and the highest and most profitable use for which the property is adaptable and needed, or likely to be needed, in the reasonably near future, is to be considered to the extent that the prospects of demand for such use affects the market value which the property is privately held. The fact that the most profitable use of a parcel can be made only in combination with other lands does not necessarily exclude that use from consideration if the possibility of combination is reasonably sufficient to affect market value. (Olson vs. United States, supra).

20. In considering the uses for which property sought to be condemned (or for which claim for taking is made) is suitable, as affecting its market value, the fact that it may be, or is being, or has been acquired by eminent domain does not negative consideration of its availability for use in the public service, since those having the power of condemnation frequently are actual or potential competitors for rights of way, locations, sites, and other areas requiring the union of numerous parcels held by different owners. (Olson vs. United States, supra).

21. To the extent that public demand by prospective purchasers or condemners affects market value, it is to be taken into account in determining the just compensation to which the owner of property is entitled on its condemnation, or suit for its taking. (Olson vs. United States, supra).

22. The value of property condemned, or taken, by which compensation to its owner is measured, does not include any element resulting subsequently to or because of the taking. (Olson vs. United States, supra).

23. Intermittent overflows of agricultural land in consequence of the construction of flood control works by the United States amounts to a partial taking for which just compensation is required by the Fifth Amendment of the Federal Constitution. (Jacobs vs. United States, 290 U. S. 13, 54 S. Ct. 26, 78 L. ed. 142).



24. Interest on the amount of damage caused by the construction of flood control works authorized by the provisions of the Flood Control Act of May 15, 1928, to lands which will be intermittently flooded in consequence, from the date of the taking of such flowage rights, is a part of the just compensation recoverable by the landowner. (*Jacobs vs. United States*, supra; *United States vs. Creek Nation*, 295 U. S. 103, 55 S. Ct. 681, 79 L. ed. 1331, at p. 1332, 1336).

25. The fact that condemnation proceedings were not instituted by the United States against the petitioner, and that her right to compensation is asserted in this suit by her, does not change the essential nature of the claim. The form of the remedy does not qualify petitioner's right to just compensation as guaranteed by the Fifth Amendment of the Federal Constitution. (*Jacobs vs. United States*, supra).

26. Where the language of an Act of Congress is not clear, the Court is justified in seeking enlightenment from the reports of Congressional Committees and explanations given on the floor of the Senate and House by those in charge of the measure, the legislative history of the Bill, and the testimony of official heads of Departments of the Government given in Hearings before Congressional Committees on the Bill. (*Wright vs. Vinton Branch, etc.*, decided March 29, 1937, 81 L. ed. 487, 491-494; *U. S. vs. Butler et al.*, January 6, 1936—Agricultural Adjustment Act decision; *Savage vs. U. S.*, 1 Ct. Cls. 170; *Robinson vs. U. S.*, 50 Ct. Cls. 159; *Thornton vs. U. S.*, 271 U. S. 414, 46 S. Ct. 585, 70 L. ed. 1013, 1017; *Ariz. vs. Calif.*, 283 U. S. 423, 51 S. Ct. 522, 75 L. ed. 1154, 1165; 22 Corpus Juris, Sec. 1901).

27. As a matter of law, the Congress contemplated, and intended by the language of the Flood Control Act of May 15, 1928, the payment of damages to property owners in the Boeuf Floodway for flowage rights, such as petitioner seeks in the case at bar. (Petitioner's Brief in U. S. Court of Claims, pp. 83-93 and 211-231).

28. The compensation for private property taken for public use must, under the Fifth Amendment of the Federal Constitution, be a full and perfect equivalent for the property taken. The Congress may determine what private property is needed for public purposes, but when the taking has been ordered then the question of compensation is judicial. (*Monangahela Nav. Co. vs. U. S.*, 143 U. S. 312, 37 L. ed. 463; *U. S. vs. New River Collieries*, 262 U. S. 341; 343, 43 S. Ct. 565, 67 L. ed. 1014, 1017).

29. In a strict legal sense, land is not "property", but is the subject of property. Property is entirely the creature of the law. It belongs not to physics but to metaphysics; and is altogether a creature of the mind. Property in a determinate object is composed of certain constituent elements, namely, the unrestricted, exclusive and perpetual right of use, enjoyment and disposal of that object. These rights cannot be materially abridged without, ipso facto, taking the owner's property. Anything which destroys any of these elements to that extent destroys the property itself. The Constitution protects these essential attributes of property. An easement is property. Any regulation which imposes a restriction on the use of the property by its owner, and any public improvement which tends to impair the unrestricted  
 420 enjoyment of property by affecting some right or easement appurtenant thereto may constitute a public use or taking within the meaning of the Constitution. Anything which destroys or subverts the exclusive right to freely use, enjoy and dispose of any determinate objects, real or personal, constitutes a "taking", or destruction pro tanto of property, notwithstanding there is no disturbance of possession or actual or physical invasion of the locus in quo. Petitioners' Brief in U. S. Court of Claims, pp. 93-104 and 239-248).

30. No actual, physical invasion is necessary to constitute a "taking" in the Constitutional sense. Any substantial interference with private property which destroys, or materially lessens its value, or by which the owner's right to its use and enjoyment is in any substantial degree abridged or destroyed, is a "taking" even though the title and possession of the owner remain undisturbed, and there is no actual, physical invasion of the property. Property is "taken" when any of its proprietary rights are taken of which property consists. That there may be a taking of property without actual physical invasion of it has often been held, and is a well-established legal principal. (Portsmouth Harbor L. & H. Co., vs. U. S. 260 U. S. 327, 43 S. Ct. 135, 67 L. ed. 287; City of Big Rapids vs. Big Rapids F. M. Co., Mich. 177 N. W. 284, 289; Webster County vs. Lutz, 234 Ky. 618, 28 S. W. (2d) 966; Kincaid vs. U. S., 37 Fed. (2d) 602; Hurley vs. Kincaid, 285 U. S. 95, 52 S. Ct. 267, 76 L. ed. 637; Prairie Pipe Line Co. vs. Shipp, Mo. 267 S. W. 647; U. S. vs. Yazoo & M. V. Ry. Co., 4 Fed. Supp. 366; Jacobs vs. U. S., 45 Fed. (2d) 34; Cooley's Const. Lim. (7th Ed.) p. 818; Louisville & N. R. Co. vs. Lambert, 35 Ky. L. R. 199, 110 S. W. 305; 20 Corpus Juris 666, Sec. 138, and numerous cases cited in foot-notes there found.)

31. The general rule of law is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. The misfortunes or necessity of certain property owners will not justify the shifting of their damages to their neighbor's shoulders. A strong public desire to improve the public condition is not enough to warrant achieving that desire by a shorter cut than the constitutional way of paying for the change. (*Pa. Coal Co. vs. Mahon*, 260 U. S. 383, 43 S. Ct. 158, 67 L. ed. 322, at p. 326).

32. Flooding of property is not a "taking" where the property has already been acquired for, and dedicated to, that purpose. Therefore, if, as and when the petitioner's property is actually flooded or invaded for actual flowage by the United States, there can be no other or further recovery by the petitioner. Actual damages for physical invasion are not recoverable against the United States, and such damages are not properly an issue in the case at bar. (*Mullen Benevolent Corporation vs. U. S.*, 290 U. S. 89, 54 S. Ct. 38, 78 L. ed. 192).

33. Compensation in general must be paid to the person who owned the property at the time it was taken or injured, or to one who, prior to the making of the award, had taken a valid assignment thereof from the owner. (20 *Corpus Juris* 847, Sec. 286, and numerous cases there cited; 20 *Corpus Juris*, p. 1186, Sec. 545 and cases cited). The right of compensation is a personal claim, and after it has once accrued does not pass by a deed to the land. (*Lewis, Eminent Domain*, (3d ed.) p. 936, and cases there cited).

34. The permanent law intends that the owner shall be put in as good condition pecuniarily by a just compensation as he would have been if the property had not been taken. No private property may be appropriated to public uses unless a full and exact equivalent for it be returned to the owner. (*Olson vs. United States*, 292 U. S. 246, 254, 255, 54 S. Ct. 704, 78 L. ed. 1236).

35. Where private property is taken for public use, and there is a market price prevailing at the time and place of the taking, that price is just compensation. (*United States vs. New River Collieries Company*, 262 U. S. 341, 43 S. Ct. 565, 67 L. ed. 1015, 1017).

36. The petitioner's compensation must be based upon the particular manner of construction authorized and stipulated by the Flood Control Act of May 15, 1928. No later modifications can be considered. The plans and specifications

set forth in House Document No. 90 adopted by the enactment of the Flood Control Act of May 15, 1928, are controlling. (Lewis on Eminent Domain (2d ed.) Sec. 712; Lewis on Eminent Domain (3d ed.) 830; East Peoria Sanit. Dist. vs. Toledo P. & W. R. Co., 353 Ill. 296, 187 NE 512, 89 A. L. R. 870, and Annotation; Brainard vs. Clapp, 10 Cush (Mass.) 6, 57 Am. Dec. 74).

37. Because there can be but one assessment of damages for a taking, the rule in condemnation proceedings is that all damages, present or prospective, that are the natural or reasonable incident of the improvement to be made or work to be constructed must be assessed. The rule is that the damages are to be assessed on the basis of the most injurious mode of construction that is reasonably possible under the authorized plan. (20 Corpus Juris 997, Sec. 394, and cases cited; 20 Corpus Juris 763, Sec. 225, and cases cited; Cleveland etc. R. Co. vs. Hadley, (Ind.) 101 NE 473, 45 L. R. A. (N. S.) 796; 2 Lewis on Eminent Domain (3d ed.) Secs. 713, 818, 825, 830, 845, 846; Doty vs. Johnson, 84 Vt. 15, 77 Atl. 866; Mo. R. & L. Co. vs. Creed (Mo.) 32 SW (2d) 783, 30 SW (2d) 605; Jacksonville & S. R. Co. vs. Kidder, 21 Ill. 131; 1 Lewis on Eminent Domain (3d ed.) Sec. 391, and cases cited.)

38. All damages, past, present and future, which naturally or necessarily or proximately arise from the taking, whether they were in contemplation of the parties at the time or not, except those resulting from negligence in the use of the property taken, are conclusively presumed to have been included in the compensation award in the condemnation, or in the suit for the "taking". (Lockhart Power Co. vs. Askew, 110 S. C. 449, 96 SE 685; Hetzel vs. Baltimore etc. R. Co., 169 U. S. 26, 42 L. ed. 648).

39. The petitioner is entitled to have her damages assessed on the assumption of the most adverse flood conditions reasonably possible, the most extreme meteorological conditions reasonably possible, including rainfall, wind, cold and heat, the most extreme flood frequencies, the most extreme flood volumes and repeated rises or crests in the same general flood, and the most extreme flood durations which might reasonably be expected to occur from time to time in the future. Regardless of what use is made by the United States of the Boeuf Floodway in the future under the provisions of existing law, the petitioner can never recover any additional compensation for any damage which may result therefrom. (United States vs. Cress, 243 U. S. 316, 329, 61 L. ed. 746, 749, 752, 753).



40. The just compensation to which petitioner is entitled for the taking of her property involved in this action is the difference between the fair market value of her property before and after its taking. The petitioner's damage for the taking is the difference between the market value of her land free from, and subject to, the flowage rights taken. The petitioner is entitled to recover the decrease in the market value of her property due to the imposition of the public easement thereon created by the Flood Control Act of May 15, 1928..(10 Ruling Case Law, p. 128, Sec. 112; 10 R. C. L., p. 134, Sec. 117; Alabama Power Co. vs. Carden, 189 Ala. 384, 66 So. 596; Emmons vs. Utilities Power Co. (N. H.) 141 Atl. 65, 58 A. L. R. 788; Seattle Mattress & Upholstry Co. vs. Seattle, 134 Wash 476, 236 Pac. 84; Schuylkill Nav. Co. vs. Thornburn, 7 Serg. & R. (pa.) 411; Olson vs. United States, 292 U. S. 246, supra).

41. There being no mandatory or compulsory provision in the present law requiring the United States to repair the fuse plug levee at the head of the Boeuf Floodway when it has crevassed, and the petitioner having no means of compelling the United States to repair any such crevasse when it occurs, any such repair would be purely gratuitous, and might never be made. Therefore, the amount of petitioner's compensation will not be reduced by anticipating that the necessary appropriations will be made by the United States for repairing the fuse plug levee after it has been breached, but her compensation will be fixed as though the Boeuf Floodway will be used after crevasse by all floods exceeding the bank-full stage of the Mississippi River in the latitude of the fuse plug levee. (Old Colony R. Co. vs. Miller, 125 Mass. 1, 21 Am. Rep. 194; 34 Stat. 764, Title 31 U. S. C. A. 627; R. S. Sec. 3733, Title 41 U. S. C. A., Sec. 12).

42. Mere difficulty in assessing damages for a taking is no sufficient reason for refusing to award them where the right to them has been established. (Ball vs. T. J. Pardy Const. Co., 108 Conn. 549, 142 Atl. 855; Hetzel vs. B. & O. Rd. Co., 169 U. S. 26, 42 L. ed. 648).

43. One of the elements to be considered in assessing just compensation to the petitioner is her loss of any increase in market value to her property in the near future and in the natural course of events as an integral part of the growth and development of the alluvial valley of the Mississippi River. (Wetmore vs. Ryner, 169 U. S. 115, 42 L. ed. 682; Olson vs. United States, supra; Conneos vs. Commonwealth, 184 Mass. 541, 69 NE 34; Southern R. Co. vs. Memphis (Tenn.) 148 SW 662 41 L. R. A. (NS) 828; Mills Eminent

Domain, Sec. 173; Lewis, Eminent Domain, Sec. 479; 425 Central Georgia Power Co. vs. Mays, 137 Ga. 120, 72 SE 900; New York etc. Co. vs. Blacker, 178 Mass. 386, 59 NE 1020; McCandless vs. United States, 56 S. Ct. 764; 1 Nicholas, Eminent Domain (1917 ed.) Sec. 219; Belle Fourche Valley Ry. vs. Belle Fourche L. & C. Co., 28 S. D. 289, 133 NW 261; Kansas City R. Co. vs. Bowles, 68 Ark. 533, 115 SW 375; Portland etc. R. Co. vs. Dearing, 78 Me. 51, 2 Atl. 670; San Diego L. & T. Co. vs. Neals, 78 Cal. 63, 20 Pac. 372, 3 L. R. A. 83; Washburn vs. Milwaukee etc. Rr. Co., 59 Wis. 364, 378; Chesapeake & O. R. Co. vs. Allen, (W. Va.), 163 SE 22; United States vs. Chandler-Dunbar, 229 U. S. 53, 57 L. ed. 1063; Duluth etc. R. Co. vs. West, 51 Minn. 163, 53 N. W. 197; Fort Smith & V. B. Bridge Dist. vs. Scott, 103 Ark. 405, 147 SW 440; St. Louis I. M. & So. R. Co. vs. Theodore Maxfield Co., 94 Ark. 135, 126 SW 83, 26 L. R. A. (N. S.) 1111; and cases passim).

44. Among other elements for compensation to which petitioner is entitled is the inconvenience in the future use of her property occasioned by the separating of her property from her adjacent market of Arkansas City by the ring levee which will be built around Arkansas City under the provisions of the Flood Control Act of May 15, 1928, and the resultant impairment of said adjacent market because of the effect of said ring levee on Arkansas City. (Lafin vs. Chicago etc. R. Co., 53 Fed. 415; Chicago - etc. R. Co. vs. Eaton, 136 Ill. 9, 26 N. E. 575; Edmands vs. Boston, 108, Mass. 535; Brainard vs. State, 131 N. Y. S. 221; Putnam vs. Douglas County, 6 Or. 328, 25 Am. Rep. 527; Wilmington etc. R. Co. vs. Stauffer, 60 Pa. St. 347, 100 Am. Dec. 574).

45. Among the additional elements taken from petitioner which are to be considered in the just compensation awarded her in this action are:

(a) Loss of levee protection and probable interference with drainage (United States vs. Chandler-Dunbar Co., 229 U. S. 53, supra; Whitcomb vs. City of Philadelphia, 264 Pa. 277, 107 Atl. 765; Vicksburg etc. Rd. Co. vs. Dillar, 35 426, La. Ann. 1045); and

(b) The increased protection which her land would have enjoyed if the program of the levee and Drainage Districts had not been stopped by the establishment of the floodway created by the Flood Control Act of May 15, 1928. (Kansas City S. Ry. Co. vs. Boles, 88 Ark. 533, supra; St. Louis etc. Rd. Co. vs. Hughes, (Tex.) 73 S. W. 976; Duluth etc. Rd. Co. vs. West, 51 Minn. 163, 53 N. W. 197); and

(c) Loss of advantage of future development and accretion in value (Moore vs. Ry. Co., 78 Wis. 120, 47 N. W. 273; St. Louis I. M. & S. Rd. Co. vs. Theodore Maxfield Co., Supra, 94 Ark. 135, 126 S. W. 83, 26 L. R. A. (N. S.) 1111; Ft. Smith etc. District vs. Scott, 103 Ark. 495, 147 S. W. 440; Kansas City S. Ry. Co. vs. Boles 88 Ark. 533, 115 S. W. 375; Duluth etc. Rd. Co. vs. West, 51 Minn. 163, 53 N. W. 197; El Paso vs. Coffin, (Tex.) 88 S. W. 502; Sullivan vs. Mo. Pac. Rd. Co., (Tex.) 68 S. W. 745; St. Louis etc. R. Co. vs. Hughes, (Tex.) 73 S. W. 976); and

(d) Probable injury to person and property (Telluride Power Co. vs. Burneau, 41 Utah 4, 125 Pac. 399); and

(e) Additional expense of transporting the products of the land to market (Rumsey vs. New York etc. Rd. Co., 133 N. Y. 79, 30 N. E. 654, 15 L. R. A. 618); and

(f) More difficult accessibility because more difficult ingress and egress because of side protection levees to the floodway as planned (United States vs. Welch, 217 U. S. 333, 30 S. Ct. 527, 57 L. ed. 787, 28 L. R. A. (N. S.) 385, 19 Ann. Cas. 680; United States vs. Grizzard, 219 U. S. 180, 31 S. Ct. 162, 55 L. ed. 165, 31 L. R. A. (N. S.) 1135; Rumsey vs. New York etc. Rd. Co., 133 N. Y. 79, 30 N. E. 654, 15 L. R. A. 618; Weyer vs. Chicago etc. Rd. Co., 68 Wis. 180, 31 N. W. 710).

427 46. If fears and apprehended risks and dangers to property be reasonable, not ill-defined but founded on practical experience, and be the result of intentional and authorized acts on the part of the Government, and if such fears be entertained so generally as to enter into the calculations of all who propose to buy or sell so that the public is frightened from the premises because of the imminence of such threatened and intended dangers with resulting loss of market value, the property owner is entitled to be compensated for such loss. (Portsmouth Harbor L. & H. Co. vs. United States, 260 U. S. 327, 43 S. Ct. 135, 67 L. ed. 287; Ky. Hydro-Elec. Co. vs. Woodard, 216 Ky. 618, 287 S. W. 985; Erazee vs. Ky. Utilities Co., 217 Ky. 424, 289 S. W. 675; Texas Pipe Line Co. vs. Stewart, (Mo.) 35 S. W. (2d) 627).

47. On the issue of loss of market value, all evidence is competent which establishes any fact which would affect the value of the property in the eyes of a purchaser. It is competent to consider every fact and feature and consideration which would influence the general buyer. The exposure of such property to hazards and dangers may be considered, together with all pertinent facts which are the proximate cause of the depreciation of market value to the owner's loss.

No element should be excluded in arriving at the market value of premises which is customary for the business world to consider in determining such market value, or which an ordinarily prudent person would take into account before forming a judgment as to the market value of the property which he is about to purchase. (Ind. etc. Co. vs. Pa. Rd. Co., 229 Pa. 484, 487, 78 Atl. 1039; Snyder vs. The Western Union Railroad Co., 25 Wis. 60; Voigt vs. Milwaukee, 158 Wis. 666, 149 N. W. 392; Brainard vs. State, 131 N. W. S. 221; St. Louis etc. R. Co. vs. Mendoza, 193 Mo. 518, 525, 91 S. W. 65, 66; Little Rock Junction vs. Woodruff, 49 Ark. 381, 5 S. W. 592; Miss. & R. R. Boom Co. vs. Patterson, 98 U. S. 403, 25 L. ed. 206, 208).

428 48. Theory cannot prevail over the established fact. Evidence of sales of land of like character and similarly situated, in the same general vicinity, and not remote in point of time from the alleged taking, is admissible on the question of market values.

The theories of expert witnesses are never to be regarded when they manifestly conflict with the established facts. The mere opinion of experts is not to be allowed to outweigh the positive, corroborated and uncontradicted testimony of unimpeached witnesses to a fact, such as actual sales establishing market values.

Facts are always superior to theory.

(2 Jones, Commentaries on Evidence, (2d) p. 1305, Sec. 698; Kansas City etc. R. Co. vs. Haake, (Mo.) 53 S. W. (2d) 891, 84 A. L. R. 1474; Kelley vs. Cable Co., 8 Mont. 440; Laughlin vs. St. R. Co., 62 Mich 220; People vs. Vanderhoff, 71 Mich. 158; Stone vs. Chicago etc. R. Co., 66 Mich 76; Sanders vs. State, 94 Ind. 147; Treat vs. Bates, 27 Mich 390; and cases passim.)

49. Evidence of market values in counties other than that in which petitioner's property lies (Desha County, Arkansas), and at periods of time remote from the time of the alleged taking of petitioner's property, and evidence of sales the circumstances of which are not shown by the evidence, and the characteristics of the property which is sold not being disclosed by the evidence, is all irrelevant and incompetent, and cannot be considered as tending to show either the loss, or the lack of loss, of the market value of petitioner's property caused by the alleged taking.

The correct measure of compensation to be awarded to the petitioner in the case at bar is the difference between the fair market value of her property immediately before the



alleged taking as compared with its fair market value immediately after the alleged taking, the difference in market value being fixed by the time of the taking and solely because of the alleged taking. (United States vs. New River Collieries Co., 276 Fed. 690, Affirmed 262 U. S. 341, 43 S. Ct. 565, 67 L. ed. 1014; National City Bank vs. United States, 275 Fed. 855, affirmed 281 Fed. 754; United States vs. Inlots, 26 Fed. Cas. 490, 494, affirmed in Kohl vs. United States, 91 U. S. 367, 23 L. ed. 449; Orgel on Valuation under Eminent Domain, (1936) p. 68, Sec. 20; id. p. 112, Seq; id. pp. 463-464, Sec. 137).

50. Because the petitioner was immediately entitled to compensation at the time of the "taking" of her property (Jacobs vs. United States, 290 U. S. 13, 54 S. Ct. 26, 78 L. ed. 37, 96 A. L. R. 1; United States vs. Creek Nation, 295 U. S. 103, 55 S. Ct. 681, 79 L. ed. 1331; Seaboard Air Line Ry. Co. vs. United States, 261 U. S. 299, 43 S. Ct. 354, 67 L. ed. 664; Phelps vs. United States, 274 U. S. 341, 47 S. Ct. 611, 71 L. ed. 1083; Brooks-Scanlon Corp. vs. United States, 265 U. S. 106, 44 S. Ct. 471, 68 L. ed. 934), under the circumstances, knowledge, plans, authorities and expectations which existed at the time of the taking, no evidence of changes in plans after the "taking", and especially no developments or changes in plans or modifications after the filing of petitioner's suit, can be considered in awarding petitioner just compensation in this action.

51. The Flood Control Act of June 15, 1936, has no effect upon the petitioner's cause of action; except that Section 2 of said Act is an expressed admission by the United States that the Boeuf Floodway is in operative condition, and that the United States will continue to hold its right to flood petitioner's property for an indefinite period of time in the future as contemplated by the Flood Control Act of May 15, 1928. Section 2 of the Flood Control Act of June 15, 1936, is a ratification and confirmation of the taking of petitioner's property as is alleged in this action.

52. As a matter of law, the United States cannot take advantage of its own wrong by acquiring flowage rights over the petitioner's property under the provisions of the Flood Control Act of June 15, 1936, at values which were impaired or destroyed by the Flood Control Act of May 15, 1928.

The placing of petitioner's property in the Boeuf Floodway by the Flood Control Act of May 15, 1928, destroyed the greater part of its market value. If and when the Act of June 15, 1936, becomes effective, petitioner can be paid under the

provisions of that Act for flowage rights over her property only on the basis of values then existing. These values are now nominal as compared with the market values before the taking of petitioner's property by the United States as a result of the Flood Control Act of May 15, 1928. Thus petitioner can secure no adequate just compensation as required by the Fifth Amendment of the Constitution under the provisions of the Flood Control Act of June 15, 1936.

The award and judgment in this case at bar will preclude and prevent the plaintiff from asserting any additional claim for flowage rights exercised under the provisions of the 1936 Flood Control Act.

53. The program of cut-offs which have been developed in the Middle Section of the Mississippi River since the year 1932, can have no legal effect upon the petitioner's right of action for a taking of her property long prior to the initiation of said system of cut-offs for alleged channel stabilization.

54. As a matter of law, said system of cut-offs was neither contemplated nor authorized by the Flood Control Act of May 15, 1928. (See Doc. 90, Sec. 69, p. 17).

55. When property is taken, its value to the owner is the only strictly relevant value, and market value is acceptable only to the extent that it may be taken as a practical measure of value to the owner. Just compensation is a compensation sufficient to make good the loss of the owner at the  
431 time of the taking. The owner is entitled to the full money equivalent of the property taken, and thereby to be put in as good a position pecuniarily as she would have occupied if her property had not been taken. The petitioner must be compensated for what was taken from her as of the time of the taking. This requirement determines the minimum basis of compensation throughout the entire United States. (Orgel on Valuation under Eminent Domain, pp. 18, 46, 146; United States vs. New River Collieries Co., supra; United States vs. Chandler-Dunbar Co., supra; Omnia Commercial Co. vs. United States, 261 U. S. 502, 63 S. Ct. 437, 67 L. ed. 773; Jacobs vs. United States, supra; United States vs. Creek Nation, supra; Seaboard Air Line Ry. Co. vs. United States, supra; Phelps vs. United States, supra; Brooks-Scanlin Corp. vs. United States, supra).

56. Since January 10, 1929, the United States has had and exercised the complete legal right of supervision and control over the fuse plug levee at the head or entrance of the Boeuf Floodway for the purpose of keeping it as a fuse plug levee

ized by the Flood Control Act of May 15, 1928. (Doc. 90, Secs. 16, 98, 117, 118, 120, and 149; Sec. 9, Flood Control Act of May 15, 1928, Title 33 U. S. C. A., Sec. 702i; 30 Stat. 1152, Title 33 U. S. C. A., Sec. 408; 39 Stat. 950, Title 33 U. S. C. A., Sec. 701; 42 Stat. 1505, Title 33 U. S. C. A., Sec. 702; *Houck vs. United States*, 201 Fed. 862; *Cape Girardeau & T. B. T. R. Co. vs. Jordan*, 201 Fed. 868.

57. Owners of distinct interests in a tract of land taken by the Government for public use, as for instance the respective owners of the fee title, an easement therein or thereover, a mortgage or other lien thereon, or interest therein, have separate rights of action; and may not be forced to pool their interests and have the damages or compensation assessed in a lump sum, and awarded as if the land were  
432 the sole, entire and complete property of one owner.

The Fifth Amendment merely requires that an owner of property taken should be paid for what is taken from him. It deals with persons, not with tracts of land. The question is, What has the owner lost? Not, What has the taker gained? (*Boston Chamber of Commerce vs. City of Boston*, 217 U. S. 189, 54 L. ed. 725, 727).

Persons holding several distinct interests in the same parcel of land may proceed separately to enforce their respective rights. (*A. W. Duckett & Co. vs. United States*, 266 U. S. 149; 45 S. Ct. 38, 69 L. ed. 216, 217; *United States vs. Welch*, 217 U. S. 333, 30 S. Ct. 527, 54 L. ed. 787, 789; *Wayne County, Ky. vs. United States*, 53 Ct. Cls. 417, affirmed 252 U. S. 574, 40 S. Ct. 394, 64 L. ed. 723; 20 *Corpus Juris* 1187, and numerous cases there cited in footnotes 16 and 17).

Two or more persons having distinct causes of action, although against the same defendant, may not join as plaintiffs in one suit, and it is immaterial that the causes of action arise out of the same transaction, or that they are kindred and dependent upon similar facts. (47 *Corpus Juris*, p. 56, Sec. 115, and cases cited in footnotes).

58. The cause of action is the subject-matter of the controversy, and that is, for all the purposes of the suit, whatever the plaintiff declares it to be in her pleadings. *Chicago B. & Q. Ry. Co., vs. Willard*, 220 U. S. 413, 55 L. ed. 521, 526, and numerous other decisions there cited).

A plaintiff has the right to prosecute her suit to final decision in her own way. The plaintiff may select her own manner of bringing her action. The plaintiff may elect her own

tion, bill or complaint is to determine the character of the controversy. (Chicago B. & Q. Ry. Co. vs. Willard, supra).

59. The fact that claimant's interest is less than the whole property does not affect her right to compensation for the property taken or damaged. (20 Corpus Juris, p. 653, Sec. 130, and cases cited; Olson vs. Seattle, 30 Wash. 687, 71 Pac. 201; St. Louis etc. R. Co. vs. Pfennighausen, 7 Ind. T. 685; and other decisions passim).

60. Neither the Southeast Arkansas Levee District, the Cypress Creek Drainage District, the Receiver for either of said Districts, the Trustees for the bondholders of either of said Districts, nor any of the other parties to this action have any interest in the petitioner's cause of action against the United States as the same is alleged in her own petition. (Authorities hereinbefore cited).

If the defendant, the United States, desired to have the entire title to the land adjudicated, together with every interest therein and claim thereon, and to have had the just compensation awarded in one lump sum, it should have brought condemnation proceedings against the petitioner's land as is authorized by the provisions of Section 4 of the Flood Control Act of May 15, 1928, naming as parties defendant whomsoever it desired. In that event the United States would have been the plaintiff, which would have entitled it (rather than the petitioner) to have declared its own cause of action, and to have prosecuted its such suit (condemnation proceedings) to final decision in its own way, naming as parties defendant whomsoever it desired.

61. As a matter of law, under the evidence in this case, the petitioner is entitled to judgment against the defendant, the United States, in the sum of \$4,000.00, together with interest thereon at the rate of 6% per annum from January 10, 1929, until paid, and for all her costs incurred in this litigation.

62. Costs are properly allowed against the United States in a suit brought under the Tucker Act. (United States vs. Cress, 243 U. S. 316, 330, 61 L. ed. 746, 754).

Whereupon, the defendant, separately and severally, requested the Court to make the following

(Findings of Fact requested by Defendant.)

#### Findings of Fact.

1. "The project for the Flood Control of the Mississippi River in its alluvial valley, and for its improvement from the



Head of Passes to Cape Girardeau, Mo." was authorized by the Act of May 15, 1928, c. 569; 45 Stat. 534.

### The Alluvial Valley

2. The alluvial valley of the Mississippi River within which is included the lands of plaintiff is tersely described in the opinion delivered by Justice White in *Jackson v. United States*, 230 U. S. 3 to 5, L. C. as follows:

"The Valley of the Mississippi River, may in a broad sense be said to commence at Cape Girardeau, Missouri, and to extend from there to the mouth of the river at the Gulf of Mexico. The river, however, in its course to the ocean does not run through the center of the vast fertile and alluvial plains which in a comprehensive and generic sense constitutes the delta of the Mississippi. On the contrary, the situation of the river in this respect varies, occasioned by the fact that [a] divers places the upland or hill country approaches to or constitutes the bank of the river. The difference in this regard is marked between the west and the east banks. The west bank is divided into four great basins—The St. Francis Basin, which extends from Cape Girardeau to Helena; The

435 White River Basin, which extends from Helena to the mouth of the Arkansas; The Tensas Basin, which extends from the mouth of the Arkansas to the mouth of the Red River; and the Atchafalaya Basin, extending from the mouth of the Red River to the Gulf. Practically in the long sweep from Helena, where St. Francis Basin ends and the White River Basin begins, to the ending of the Atchafalaya Basin at the Gulf there is no real topographical distinction between the basins, the west bank of the river in that great distance consisting of alluvial country having generally a very wide though varying expanse. The division into basins putting out of view the St. Francis Basin, is therefore merely the result of a consideration of the watershed of each basin, all the water, however, from each ultimately finding its way to the Gulf of Mexico, either through the Mississippi River, or in the lower basins in part at least by the means of streams flowing independently of the Mississippi River to the Gulf of Mexico. On the east bank the situation is different. In the long stretch from Cairo, Illinois, to a point a short distance below Memphis, generally speaking, the hills and uplands border the river and constitute its bank. From the point below Memphis to which we have referred to Vicksburg, Mississippi, this is not the case, and there is a great basin known as the Yazoo Basin, which, aside from peculiarities of its own, may be said to possess the same general char-

acteristics as the basins on the west bank of the river. From Vicksburg where the uplands come to the river and constitute its bank, down to Baton Rouge, Louisiana, where the hills or uplands permanently recede from the river a different condition from that which exists on the west bank obtains."

3. This division of the alluvial valley is recognized in the report of the Chief of Engineers, *supra*, in the following manner:

"The alluvial valley of the river may be considered in three principal sections: the northern, comprising the St. Francis Basin on the west side of the river; the middle, including the Yazoo Basin on the east and the Tensas Basin on the west, running on the east from near Memphis to Vicksburg and on the west from the Arkansas River to the Red River; and the southern, or Louisiana section, from the Red River to the Gulf of Mexico." (H. D. 90, Section 12).

"Flood control must therefore be considered in three sections, the northern section from Cape Girardeau to the mouth of the Arkansas, the middle section from the mouth of the Arkansas to the Red; and the southern section from the Red to the Gulf through the main stem of the Mississippi and the Atchafalaya." (House Committee Document #1, 74th Congress, First Session, Section 5).

4. The middle section is thus divided in the reports into the eastern and western sections. The western section including the Tensas Basin wherein the Boeuf floodway, so called, is situated and is separate and apart as a distinct entity from the eastern part of the middle section which includes the Yazoo Basin as well as the northern and southern sections.

#### Action By Congress.

5. Congress did not enact into law all of the suggestions made by Gen. Jadwin in House Document 90, (Oliver 1253) but did adopt the engineering plan, in the manner following: "The project for the flood control of the Mississippi River in its alluvial valley and for the improvement from the Head of Passes to Cape Girardeau, Missouri, in accordance with the engineering plan set forth and recommended in the report submitted by the Chief of Engineers to the Secretary of War dated December 1, 1927, and printed in House Document 90, 70th Congress, First Session, is hereby adopted and authorized to be prosecuted under the direction of the Secretary of War and the supervision of the Chief of Engineers,

437 . . . . . provided that all diversion works and out-lets constructed under the provisions of Sections 702a to 702m (U. S. C. A.) or Sec. 704 of this title shall be built in a manner and a character which will fully and amply protect the adjacent lands: Provided further that pending completion of any floodway, spillway, or diversion channel, the areas within the same shall be given the same degree of protection as is afforded by levees on the west side of the river contiguous to the levees at the head of said floodway . . . . . (702a U. S. C. A.)

6. Paragraph No. 2 of Section 3 of said Act provides:

"No liability of any kind shall attach to or rest upon the United States for damages from or by floods or flood waters at any time: provided, however, that if in carrying out the purposes of Section 702a to 702m of this title it shall be found that upon any stretch of the banks of the Mississippi River it is impracticable to construct levees either because such construction is not economically justified or because such construction would unreasonably restrict the flood channel and lands in such stretch of the river are subjected to overflow and damage which are not now overflowed or damaged by reason of the construction of levees on the opposite bank of the river it shall be the duty of the Secretary of War and Chief of Engineers to institute proceedings on behalf of the United States Government to acquire the absolute ownership of the lands so subjected to overflow and damage or floodage rights over such lands. (Section 702c U. S. C. A.—Section 3 Act of May 15, 1928).

### The Engineering Plan.

7. This plan was set out in detail in the Report of Gen. Jadwin, Chief of Engineers, to the Secretary of War, and by him submitted to the President of the United States and thence by Executive Message to the Congress of the United States on the 8th day of December, 1927, and because House Document 90, 70th Congress, First Session. The plan 438 thus submitted is referred to as the Jadwin Plan, so named after its official sponsor and co-author. This report of General Jadwin published as House Document 90 embraced both the engineering plan for flood control of the Mississippi River, an elucidation thereof as well as suggestions for its operation. The plan is referred to and described by the report as "a comprehensive one, providing for the maximum flood predicted as possible, and for future ex-

pansion to meet changing conditions. It includes a spillway above New Orleans, diversion floodways in the Atchafalaya and Tensas Basins, a river bank floodway from Cairo, Illinois, to New Madrid, Missouri, together with strengthening and a moderate raising of existing levees. It is designed to prevent any material increase in flood stages. Channel stabilization and navigation improvement are included." (H. D. 90, supra, pg. 3).

8. The Engineers' Report (H. D. 90, supra) further explains the general plan stating: "The plan has been drawn to reduce to a minimum the damages to land and structures resulting from the flow at high water through the floodways. All property affected lies in the natural high water bed of the river. Much of this land was transferred to the States by the Swamp Act approved September 28, 1850." All this land was then subjected to the servitude of flooding. "The purpose of this Act (Swamp Act) was to enable the States to construct the necessary levees and drains to reclaim the swamp and overflowed lands therein. . . . Moreover, the lands with some exceptions will have the same protection as is afforded by the present levee system, a protection provided partly at the expense of the Federal Government. The exceptions are the lands in the Bonnet Carre floodway and in the setback floodway from Birds Point to New Madrid." (H. D. 90, supra, Section 32).

9. " . . . . . The excess must be spilled through safety valves when the volume exceeds the safe capacity of the river. These safety valves consist of one control spillway, several relief or fuseplug levees at present levee grade and one levee of reduced height, all emptying into natural floodways wholly or partly leveed." (Section 97)

10. "To prevent failure from causes other than topping and bank caving, the cross sections of levees must be enlarged. The section to be used will be ample to include the line of saturation and will vary with the materials and foundations in different localities. The maximum will generally be river slope 1 on 4, crown 12 feet wide, landside slope about 1 on 6. The levees generally will be raised about 3 feet, so that the selected weaker relief levees will be at about the elevation of the present levee top and will surely serve their purpose." (Sec. 98)

11. "The plan is designed to protect against the greatest flood predicted as possible, all the land in the Delta except the limited areas subject to backwater and within leveed flood-



rays. The land within the floodways will be protected against any recorded flood that has occurred except that of 1927 and possibly that of 1912 and 1882." (H. D. 90, supra, p. 99)

12. "The plan also includes an extension of revetment of the banks of the river, to reduce the danger of attacks on the foundations of the levees and their destruction by caving banks, thereby to further reduce the possibility of crevasses and to stabilize the position of the river in order that contraction or regulation works may be provided, to assist in securing and holding the low water channels needed for carrying the commerce of the valley in low water as well as in high." (Sec. 21 H. D. 90)

13. Channel stabilization both for flood control and navigation are likewise a part of the general adopted project (H. D. 90 pg 3) Channel stabilization was explained in the report, supra, in the following manner:

14. "Channel stabilization—Since the levees within the limits of this project are to be greatly enlarged, they will be much more expensive than heretofore, so something must be done to avoid the frequent moving of them from the proximity of caving banks. In addition, the river cannot be regulated for low water navigation until the banks are made stable, this both to keep the channel in one place and to stop the enormous dumping of earth into the river by bank caving. A general bank-protection scheme must be carried out that will consist of revetting banks by proven methods and in addition trying new and cheaper methods to accomplish the same results. At the same time regulation of the kind which has been successfully accomplished above Cairo will be undertaken below when and where the banks become stable. The plan includes a ten year program of channel stabilization and river regulation at a total cost of one hundred and ten million dollars or eleven million dollars per year. This program may need revision upwards after some years, as the rate and total amount of work above contemplated is a minimum." (Section 131—Mathis, 1114 and pages following)

#### Plan For Boeuf Floodway.

15. This plan established a floodway in the western section which was designated as the Boeuf Floodway, and is described in the official report, supra, as follows:

16. " . . . . A floodway for excess floods is provided down the Boeuf River on the west side of the river. . . . "

The entrance to the floodway is closed by a safety plug section of the levee at present grade, which is located at Cypress Creek near the mouth of the Arkansas. To insure their safety until this section opens, the levees on the Mississippi from the Arkansas to the Red will be raised about three feet. To prevent flood waters from entering the Tensas Basin except into the floodway during a high flood, the levees on the south side of the Arkansas will be strengthened and raised about three feet as far upstream as necessary." (H. D. 90, supra, Section 16).

441 17. "To insure that excess water will leave the main river a fuse plug section in the levee in the vicinity of Cypress Creek must be kept at its present strength and at its present grade, namely, three feet below the new levee grade. \* \* \* In order to limit the land in the Tensas Basin overflowed by it, levees will be constructed on each side of the Boeuf River bottom, where natural ridges do not serve, from the Cypress Creek levee to back-water in the lower Tensas Basin. (These levees have been referred to in the testimony as guide levees.) Arkansas City is to be inclosed with a levee. \* \* \* " (H. D. 90, supra, Sec. 118).

18. As a matter of comment and explanation to this part of the plan, the report described it as follows:

19. "The Boeuf river bottom is selected for this diversion because it is the most suitably located to receive the water, is the most direct route, has the best width, and covers largely undeveloped swamp land. Water will not top the Cypress Creek fuse plug levee and go down the floodway until it is so high that it must find an outlet. No flood except that of 1927 has reached such a stage. \* \* \* The lands in the floodway will be inundated only by floods that would overtop the present levee system and they will retain the same measure of protection as they now have." H. D. 90 supra, Section 119). The proof shows that the Boeuf Basin has always been a floodway.

20. "The guide levees heretofore referred to as such and as a part of the plan were never definitely located as an engineering fact." (Davis, 904-905). But suggested locations, however, appear for explanatory purposes on Map 2 attached to H. D. 90, supra, and on defendant's Exhibit #55. (Mathes, 1114-1120).

21. These guide levees began at the upper end of the suggested spillway just below Rohwer on the river bank or an alternate selection originating at or near Amos and extend-

ing to the vicinity of Doss and looping north to Col-  
 12 linston and with a ring levee around the city of Mon-  
 roe. This was to be the west guide levee. The east  
 guide levee beginning at a point in conjunction with the riv-  
 er side levee at or near Luna Landing running thence in a  
 southerly direction a short distance below Chicot. Thence  
 taking up again at a point further south near Terry and then  
 extending in a southwesterly direction to Alto, thence verging  
 off in a southeasterly direction to a point at or near Peck.  
 The designed fuse plug being between a point just south of  
 Rohwer and extending along the west bank of the Mississippi  
 river to Luna Landing, this being designated as the entrance  
 to the Boeuf spillway. Rohwer is approximately 19.7 miles  
 by river below Yancopin which is close to the junction of the  
 Arkansas and the Mississippi Rivers. Luna Landing is ap-  
 proximately thirty-three miles by river below Rohwer, from  
 Luna to Vacluse—eight miles. The project called for the  
 raising of the levees along the south bank of the Arkansas  
 to the 1928 grade, corresponding to 63.5 on the Arkansas City  
 gauge, the 1914 grade being 60.5, and from Yancopin to Roh-  
 wer about the same, leaving the territory between Rohwer  
 and Luna Landing at the same height as it now exists. That  
 to say, it was not a part of the project to raise any portion  
 of the levee.

22. The lands of the plaintiff in this action lie in Desha  
 county, Arkansas, about two miles west of Arkansas City on  
 the Mississippi River, the land lying in what is known as the  
 Boeuf Basin, or in the basin of the Boeuf River which has its  
 source in the northern section of Desha County and flows  
 south, enters into the Ouachita River in Louisiana, forming a  
 natural basin between Macon Ridge on the east, and the high-  
 lands on the west. Boeuf Basin has always been a natural  
 roadway for Mississippi water from the Mississippi River on  
 the east and the Arkansas and Flat Rivers to the north.  
 Plaintiff's land and other land similarly situated have  
 23 been repeatedly overflowed by deep high water and  
 never have been entirely free from overflow notwithstanding  
 the construction of good strong levees. (Citations:  
 Neptune 172, 173; Sponenbarger 381; Thompson, 395, 597,  
 5; Parker, 619, 650; Courtney, 717).

23. In 1927 a general flood of the tributaries of the Missis-  
 sippi River and all the Mississippi Basin including the Arkan-  
 sas and White Rivers caused a flood that was unprecedented  
 in the memory of living man according to official records, and  
 was the greatest in the whole section for more than a hundred  
 years. This flood inundated the land of the plaintiff and all

other lands similarly situated to a depth of fifteen to twenty feet according to witnesses, and including the town of Arkansas City, causing a general devastation in that area and the loss of livestock, improvements and other damage. (Citations: Neptune, 223, 224; Thompson, 493, 494, 495, 521, 527; Parker, 616, 648, 650; Zellner, 704; Courtney, 717; Matthes, 771; all plaintiff's witnesses. See also photographs of Arkansas City taken during the flood of 1927 and filed as exhibit.)

24. After the destructive flood of 1927, the Chief of Engineers, Major General Edgar Jadwin, made a report to the Secretary of War covering the result of a study of the subject of flood control along the alluvial valley of the Mississippi River front, and having for its purpose the recommendation of a plan that would reduce the hazards and loss from destructive floods along the Mississippi River and its tributaries. The work and improvement was to be divided into three distinct sections; one, the northern; two, central or middle; three, the southern. Each of these sections was to come under a separate, distinct, and well defined plan peculiar each to the section so to be protected. Plaintiff's land

and land similarly situated all would be in the central  
444 middle section which comprises that part of the Mississippi Delta lying between the mouth of the Arkansas River on the north and the Red River in Louisiana on the south. At the time of the passage of the Flood Control Act of May 15, 1928, there stood a line of levees along the Mississippi and south of Arkansas River including the Cypress Creek levee. These levees had been constructed under the Levee District system, paid for by the land owners in this area. These levees were built to the 1914 grade. It had been found and was so reported in the letter of recommendation of General Jadwin that the waters south of Arkansas could not be controlled by levee. It was therefore recommended that the levees south of Arkansas City be raised three feet and the remainder left at its present grade.

25. The so called Boeuf floodway was a separate and independent project provided for by the engineering plan adopted by Congress in the Act of May 15, 1928, Chapter 569, and no work has been done within said area as part of the construction program for the creation thereof in accordance with the plans aforesaid and as had been suggested by the letter of General Jadwin to the Secretary of War. (Citations: Matthews, 820; Cain, 900, 905; Holland, 979).

26. Congress by the adoption of the Act of June 15, 1936, abandoned that part of the flood control project of 1928 in



so far as it affects the Boeuf Floodway and in lieu thereof has created the Eudora Floodway as a substitute for the so called Boeuf Floodway (Citations: Davis, 900-905; Moore, 920; Matthes, 1149; Holland, 977-978; Seybold, 1328) and the Chief of Engineers through his duly constituted agents and employees are now engaged in the taking of options on land and easements within the said proposed Eudora Floodway as provided for by the Act of 1936 creating same. (Citations: Matthes, 1189, 1243; Seybold, 1328, 1339, 1353, 1342, 1343).

445 27. Although the Flood Control Act of May 15, 1928, which adopted generally the engineering plan proposed, provides for a floodway down through the Boeuf Basin and for a fuse plug at the head thereof and further provides for the construction of guide levees therein, within which plaintiff's lands are located, the Court finds that no work was ever commenced on the construction of said floodway and that nothing has been done toward the prosecution of such a plan, or the construction of such guide levees, and that plaintiff has at all times continued to exercise her rights of ownership and dominion over her said lands and has operated her farm and has secured loans thereon and the United States Government has not committed any act which amounts in law to a taking of any part of her property. (Citation: Matthes, 1200; Seybold, 1343; Davis, 900, 905; Moore, 920).

28. Although Section 1 of the Act of May 15, 1928, adopted the Engineering Plan as set forth in House Document 90 this same section nevertheless makes certain exceptions and provisions which act as a restriction upon the full adoption of the plan as submitted by General Jadwin. The Mississippi River Commission had likewise made suggestions for a plan for flood control and Congress provided in the manner following, quoting from Section 1:

29. "Provided that a Board to consist of the Chief of Engineers, the President of the Mississippi River Commission, and a civil engineer chosen from civil life to be appointed by the President by and with the advice and consent of the Senate . . . is hereby created and such Board is authorized and directed to consider the engineering differences between the adopted project and the plans recommended by the Mississippi River Commission in its special report dated November 28, 1927, and after such study and such further surveys as may be necessary to recom-

446 mend to the President such action as may be deemed necessary to be taken in respect to such engineering

differences and the decision of the President upon all recommendations or questions submitted to him by such Board shall be followed in carrying out the project herein adopted . . . . . Such project and the changes therein if any, shall be executed in accordance with the provisions of Section 702h of this title."

It is clear, therefore, that the Flood Control Act was only an enabling Act. It constituted an expression from Congress authorizing and delegating authority to constituted commissions and engineers and the Secretary of War to proceed in the execution of a flood control system, as in their judgment would nearest approach the accomplishment of the herculean task of controlling the Mississippi River floods and afford maximum protection to the residents and property in the alluvial section. The Jadwin Report appearing in House Document 90 was therefore only tentative in its character subject to change. It was but a mere outline or a suggestion to Congress or a general scheme of flood control within the alluvial valley. In the words of General Jadwin himself this is explained:

"The plan herein recommended is general in its scope. It is recommended that the responsibility for the execution of the plan, the details of the design, and the location of the engineering works, and structures be placed upon the Chief of Engineers under the supervision of the Secretary of War as is done by Act of Congress in the case of River and Harbor Improvements." (Letter of Transmission, House Document 90, 70th Congress, First Session, Section 139.)

30. As a result of work done under authority of Congress expressed in the said Flood Control Act of May 15, 1928, the river has been shortened one hundred miles between Arkansas City and the Old River by cut-offs and the bed of the river has been lowered by dredging and this work is still in progress. (Citations: Matthes, 1121, 1130, 1137, 1160, 1140, 1147) The greatest improvement that has resulted is shown in the vicinity of Arkansas City and the fuse plug. (Matthes, 1147) As a result of these cut-offs, the height of the river has been lowered five or six feet as was shown by the flood of 1937. (McGehee, 925; Matthes, 1147) During the flood of 1937 approximately two million cubic feet of water per second came down the main channel of the Mississippi River, but left a freeboard on the levees of three feet to five feet. It was therefore found that in view of the effect of the cut-offs it would not have been necessary to raise the levees in the first instance as they

would have carried all the water that came down the river without overtopping. (Matthes, 1179) As an additional result of the dredging and cut-off work, a flow of two million feet per second in the channel of the Mississippi and an additional flow of one million two hundred thousand cubic feet per second from the Arkansas and White Rivers could now be carried safely by the fuse plug levee.

31. The adopted plan of the Flood Control Act of May 15, 1928, has been by subsequent legislation and acts of Congress modified and changed especially as relates to the Boeuf Basin, and the plan as then adopted has been abandoned and no longer is considered a part of the plan of flood control in the western part of the middle section of the alluvial valley. (Citation: Davis, 900, 905; Moore, 920; Matthes, 1149; Seybold, 1328, 1343; Holland, 977, 978).

32. The Chief of Engineers acting within the scope of his authority delegated by the Act of Congress established the various cut-offs and engaged in corrective dredging of the channel heretofore set out, as an aid of flood control as well as an aid of navigation and the improvement of the Mississippi River from the Head of Passes to Cape Girardenu, and these cut-offs have materially reduced the flood crest in time of high water and have aided in the escape of such flood water thereby permitting the passage thereof by the gauge at Arkansas City at a very material reduction in said crest from that which had existed theretofore, prior to the construction and operation of said cut-offs. (Citation: Neptune, 200, 201; Matthes, 1140, 1148, 1176; Morris, 1285; Clemens, 1369, 1385).

33. During the flood of 1929 there was a flow of a million, eight hundred thousand cubic feet per second down the main channel of the Mississippi River; and the gauge at Arkansas City had a reading of 58.8 feet. In the flood of 1937 there was a flow of two million, one hundred thousand cubic feet per second with a gauge at the same place of 53.8 feet or a gauge reading of five feet less water with a flowage of three hundred thousand cubic feet more water at the same place. (Citation: Neptune, 200, 201; Matthes, 1140, 1148, 1176; Morris, 1285.) There was a twenty per cent greater flow past Arkansas City in 1937 than in 1929 with a five foot lower stage. (Morris, 1285)

34. The lowering of the gauge of the river at Arkansas City five feet as shown by the flood of 1937 from the gauge as registered at that place in 1929 in spite of the fact that an excess of three hundred thousand cubic feet per second more

water was discharged in 1937 than in 1929, is a result of work done by the Engineering Force under authority and direction of the Flood Control Act of May 15, 1928; and the strengthening of the channel, revetment work and dredging as testified to were designed and intended to aid in channel stabilization and in aid of navigation and flood control and for the more rapid escapement of flood water at a reduced elevation than existed prior to their construction in [in] channel  
 449 stabilization, flood control, and navigation. Such constructing of the cut-offs, strengthening of banks, revetments, and dredging as aforesaid has enlarged and improved the flood channel carrying capacity of the main river and a reduction of crest flow at all times, thereby materially reducing the flood heights along the fuse plug section of the levee. This work has afforded additional protection to the land of the plaintiff and land similarly situated. (Citation: Matthes 1139, 1140, 1156, 1179; Seybold, 1328; Clemens, 1386)

35. The reconstruction of the levees on the south bank of the Arkansas River between Pine Bluff and Yancopin by the United States Government was done because the crevassing of said levees by the 1927 high water on the Arkansas River; and the raising of said levees was within the purview and discretion of the Mississippi River Commission, independent of the Flood Control Act of May 15, 1928, and the same was done in order to afford additional protection to the territory which has been overflowed by the 1927 flood; and by such levee construction to said area just now received more protection than theretofore enjoyed. However, in the 1927 flood the levees on the south bank of the Arkansas River were inadequate and insufficient to protect the inhabitants throughout the Boeuf Basin from excessive water that might occur within the Arkansas River. (Citation: Oliver, 1249, 1257; Morris, 1290, 1291, 1292)

36. The building and improvements on the plaintiff's lands were destroyed by the flood of 1927 and prior to the passage of the Flood Control Act of 1928, and the property of plaintiff has been subjected to flood waters when the river reached high stages upon determined length of time and flood waters flowed over the lands of plaintiff in the years 1912, 1913, 1919, 1921, 1922, and 1927, and the flood waters of 1935 would have flooded plaintiff's property but for the flood control levee erected by the United States Government in  
 450 replacing and repairing the levees of the Arkansas River at the points known as Medford and Pendleton. (Citation: Simons, 305; Morris, 1290, 1292)



37. All improvements upon lands located immediately behind levees along the main stem of the Mississippi River including those of plaintiff are at all times of the flood stages of the river subjected to extreme hazards, and any such improvements so located are liable at any time to be inundated and destroyed by the breaking of said river front levee and by natural crevassings that may occur due to the action of such flood water, and the construction of a river front levee on the main stem of the Mississippi River, regardless of their height and strength is at all times subjected to the same hazard of the natural consequences of the action of the water thereon and such properties have no assurance against any devastating overflow; moreover, it is impossible to predict accurately what stages the river flood may reach. (Citation: Neal, 712; Courtney, 717; Moore, 921; Dabley, 948; Meador, 1011; Kopps, 1009)

38. Land values generally declined in every locality during the early twenties and then experienced some renewal of strength until 1928. From then the market showed a general weakness until it completely collapsed in 1930 and only showed some evidence of revival in 1934. Plaintiff's land and land similarly situated, in addition to feeling the effects of the general depression in real estate value, were burdened with heavy improvement taxes, including levee, drainage, road and special school taxes. But only one-fifth or one-fourth of these lands being in cultivation and revenue producing these taxes were an additional burden on the total acreage of any individual ownership. These heavy tax burdens coupled with the low price of cotton, the principal money crop of that section, resulted in heavy forfeitures, all of which tended to destroy land values and all market  
451 for land. This condition existed prior to the passage of the Act of May 15, 1928, commonly known as the Flood Control Act. (Citation: Matthews, 802; Caine, 834, 839; Moore, 913, 914; McGehee, 926; Dabney, 942; Farrell, 981; Meador, 1016; Drew, 1044)

39. That in spite of the flood of 1927 and the almost confiscatory tax burdens these lands bore, loans were made upon these lands in the Boeuf Basin, including the lands of plaintiff and other lands similarly situated. (Citation: Pre-wett, 723; Caine, 834, 845)

40. No proof has been offered by plaintiff that she has been unable to make a sale of her property since the passage of the Flood Control Act of 1928 or that she has made any attempt to make a sale of her property, but if the plaintiff has been unable to make a sale or negotiate loans on her said

property and the land value has been reduced, it has not been due to any act on the part of the United States that would amount in law to a taking, but has been wholly due to a multiplicity of causes including the destructiveness of the flood of 1927, the general depression following that flood, and to excessive taxes both general and special within the State. (Citation: Matthews, 802; Caine, 834 to 839; Davis, 881; Moore, 914, 913; McGehee, 926; Dabney, 942; Farrell, 981; Meador, 1016; Gould, 1000) But it is further found by the Court that in spite of the flood of 1927 and the general depression and the burden from taxes, land in the vicinity of plaintiff's land has been sold and loans have been made thereon since the passage of the Act of 1928, and that the sale and loan values of land have not been destroyed. (Citation: Sponenbarger, 383-385; Thompson, 593-594; Prewett, 723; Bailey, 1064-1074; Exhibit #47; Holland, 966)

41. In addition to the fact that land in the vicinity of plaintiff's land described in her complaint maintained a sale and loan value after the passage of the Flood Control Act of May 15, 1928, (Bailey, 1064, 1074; Exhibit #47; Holland, 966) plaintiff has herself repeatedly borrowed money upon the security of her land described in her complaint in this case since the passage of the said Flood Control Act of May 15, 1928. (Sponenbarger, 383, 385; Thompson, 593, 594; Prewett, 723)

42. Any depreciation in the market value of plaintiff's land from the price level of 1926 has not been due to the passage of the Flood Control Act of May 15, 1928, nor has it been the result of any action on the part of the defendant government through its officers, agents, or employees, but on the contrary is due to a multiplicity of causes, namely: the general depression, burdensome taxes, the low price of cotton, and the flood of 1927. (Citation:—Prewett, 723; Matthews, 807; Cone, 833-835; Davis, 880-895; Moore, 910, 911, 913, 914; McGehee, 926; Dabney, 942; Holland, 966-969; Bailey, 1064, 1074; Exhibit #47)

43. There is no proof nor has the plaintiff attempted to show that she has been molested in the possession of her property, or that her possession has been interfered with, in the exercise of her right of ownership, nor has the United States, its agents, officers, or employees, committed any act or deed that would amount to a taking of any part of her property; but on the contrary she has remained in the continuous, notorious, uninterrupted and peaceful possession of her property, enjoying all of its fruits and advantages, and has continuously operated her farm and collected the pro-

ceeds of the crops thereon, and used same as collateral for loans; and the damages claimed, if any, are wholly speculative, consequential, and anticipatory. (Sponenbarger, 379; Thompson, 598, 601; Parker, 638, 651)

44. The United States Government, its officers and agents entrusted with the carrying out of the Flood Control Act have not diverted or caused to be diverted any excessive flood waters from the main channel of the Mississippi River to the so called Boeuf fuse plug and into the so called Boeuf Floodway or the Tensas Basin. The property of plaintiff and those similarly situated is not subjected to any additional servitude from excessive flood waters than existed prior to the passage of the Flood Control Act of May 15, 1928. (Citation: Sponenbarger, 379; Hopson, 473; Thompson, 598, 601; Parker, 638; Davis, 886; Wonson, 272; Simons, 320, 321; Neal, 713)

45. The United States Government has in no wise interfered with the Cypress Creek Drainage District or with any other drainage system that affects plaintiff's land and lands similarly situated but that said land in said district enjoys the same benefits from the drainage systems constructed therein as it did prior to the Flood Control Act of May 15, 1928; and the United States has in no wise interfered with or changed in any manner the operation of said drainage system and the property within said district now enjoys the same benefits from said drainage system as when the same was created in so far as any interference by the United States therein is involved.

46. Whereas plaintiff's land and other lands similarly situated were repeatedly subject to overflow prior to the passage of the Act of May 15, 1928, they have at no time since the passage of said Act been overflowed by additional destructive flood waters that passed by reason of diversion from the main channel of the Mississippi River nor have such lands been at any time inundated by any act or project or carried out by the United States since the passage of said Flood Control Act.

47. Notwithstanding the fact that since the passage of the Flood Control Act of 1928 there have been three great floods on the Mississippi River, namely, 1929, 1935, and 1937, plaintiff's lands and other land similarly situated have been free from overflow or from any water that overflowed their land as a result of any flood on the Mississippi or as the direct or indirect result of any work done under the authority of said Act of May 15, 1928. (Citation:

Wonson, 272; Sponenbarger, 372; Simons, 320, 321; Neal, 713)

48. The plaintiff's property at the time of the alleged taking as set out in her petition and since that date has had the same protection on the main stem of the Mississippi River as it enjoyed prior to the passage of the Flood Control Act and has been afforded better protection and security than theretofore existed by reason of increased levee protection on the south bank of the Arkansas River; and in addition thereto the work done under the authority of the Flood Control Act of 1928 at other localities than in the so-called Boeuf Floodway, has in no wise changed, altered or reduced the levee protection to plaintiff's property and other property similarly situated within the Boeuf Basin nor has it in any wise nor to any extent increased the flood hazard thereto. (Citation: Davis, 900; Matthes, 1140, 1150, 1222, 1221)

49. The Court declares that various levee and drainage districts and the holders of bonds in such districts assert some claim against the United States growing out of the passage of the Flood Control Act of May 15, 1928, and the engineering plan therein adopted which contains certain provisions for the creation of a proposed floodway in the Boeuf Basin, that such districts and the said bond holders therein have been brought into this cause by order of this Court in order that all issues growing out of the alleged taking by the United States of land within the Boeuf Basin and all interests whatsoever that might be affected by said action may be adjudicated insofar as the interests of plaintiff's lands herein are concerned; that said levee and drainage districts are quasi-public corporations, organized and existing under and by virtue of the laws of the State of Arkansas, that said districts had issued and sold bonds and that said bonds were owned and controlled by various persons among whom

455 are the St. Louis-Union Trust Company, the Franklin-American Trust Company, and the Mercantile Commerce Bank & Trust Company, interpleaders herein by order of this Court; that the amount of bonds issued by the various corporations and the interest of the said bank and trust companies heretofore named are set out and filed in a stipulation at the close of the hearing in this case between said various parties and the defendant, and that for the purpose of this hearing and the determination of the interests of each, if any, the Court finds the matters set out in the stipulation as proven fact.

50. The Court finds that the said drainage and levee districts had issued said bonds in accordance with the provisions



of the laws of the State of Arkansas under which they were created, that such bonds are obligations of the various corporations issuing same; that under the laws of the State of Arkansas provision is made for a tax lien upon the various lands within said various districts and that the said State of Arkansas provides a method and manner for levying and collecting such taxes; that said obligations, bonds and securities so issued are the direct obligations of the various corporations issuing same and that the statutes of the State of Arkansas make a full and complete provision for the annual collection of taxes for the benefit of said districts to pay said bonds and interest thereon; that said districts were at the time of the filing of this action a legally operating body and were not *functis officio* and were required under the laws of the State of Arkansas to proceed under said laws for the collection of taxes for the payment of the various bonds then due and the interest on same; that the laws of the State of Arkansas make a full and complete provision for the assessment and collection of such annual taxes for the benefit of said districts for the purpose of the payment of said bonds and interest thereon.

456 51. The Court further finds that the various persons owning land within said districts were not direct parties in interest or privity thereto in any contract existing between said drainage and levee districts and the owners and holders of the bonds issued by them and as such there is no personal obligation other than as provided by the statutes of the State of Arkansas for the payment of taxes annually assessed for the purpose of discharging said obligations due by each and every land owner within said district.

52. The Court further finds that the said districts can collect only such taxes and in such amounts as may be lawfully levied against the land within said districts and carried out annually upon the tax books of the various county collectors.

53. The Court further finds that the United States of America is not a party to any contract immediate or remote existing between said districts and the various bond holders or between the land owners and the various districts; that the United States has not guaranteed by underwriting or otherwise any such bonds, nor has it promised to answer for the debt or default of said land owners in the payment of their taxes or of the various levee districts in the liquidation of their said bonds.

54. The Court further finds that said bond issues are pay-

entirety and that the same are not now due and payable in their entirety but various issues are not due until some remote date.

55. The Court further finds that there is no evidence in this case that any land owned defaulted in the payment of the tax assessment against him or them because of the passage of the Flood Control Act or of anything that the United States has done to prevent such payment by the said land owners, or to prevent the lawfully qualified collector of such taxes as may be due, from such land owners.

457 56. The Court further finds that such alleged owners of the bonds who are entered as interpleaders herein are still the owners and holders of said security and that the same are now in their hands and constitute a valuable asset.

57. The Court further finds that the United States has neither taken the lands within the said levee and drainage districts herein named nor the lien on any of the special assessments thereof, nor the right of the levee district to pursue its remedy against the individual owners of the land.

Whereupon, the defendant, separately and severally, requested the Court to declare the following:

(Conclusions of Law requested by Defendant.)

#### Conclusions of Law.

1. The Court declares as a matter of law that under the proof adduced in this case that the plaintiff has failed to sustain the allegations of her petition and that there is, as a matter of law, no taking of the plaintiff's property by the United States for which the said Government is liable by any law of Congress or under the Fifth Amendment to the Constitution.

2. The Court declares that under the Pleadings in this case and under the evidence adduced in support thereof, and under the law applicable thereto the Plaintiff has failed to establish a cause of action versus the United States of America and that she cannot recover.

3. The Court declares that Section 4 of the Flood Control Act of May 15, 1928, made it obligatory upon the Secretary of War to provide flowage rights only where and when "additional destructive flood waters would pass by reason of

and the Court further declares that by the term diversion as used in said Act, Congress meant "planned diversion",  
 458 and the Court further finds that it was not the intent of the Engineering Plan, adopted by Congress to cause flood waters to pass into the Boeuf Basin from the main channel of the Mississippi River by any "planned diversion"—that is by any act done or caused to be done by the Chief of Engineers, his servants, or agents, but further finds that if such waters should pass the same would be natural topping of the river banks due to the excessive height of said flood waters.

4. The Court declares as a matter of law that channel stabilization was a part and parcel of the Engineering Plan of the Flood Control Act and that the Chief of Engineers was acting within the scope of his authority in making such improvements and changes involving bank revetments, dredging of the channel, and the construction of cut-offs where in his opinion the same would serve the purpose of channel stabilization and aid of navigation. Sections 1, and 2, Act of May 15, 1928, H. D. 90, Sec. 2.

5. The Court declares as a matter of law that the Flood Control Act of 1928 and the authorized participation in matters of Flood Control on the Mississippi River within the alluvial valley was but an effort on the part of the United States to work in conjunction with the various states and political entities thereunder and not an assumption on the part of the United States to assume unrestricted control of all levees and levee structures on the main stem of the Mississippi River, Snowden vs. Red River, etc., 134 So. 389, and the Court further declares as a matter of law that the states own and control the banks of all navigable streams and that the United States has no control thereof except for the purpose of navigation and such other purposes as are delegated to the Federal Government under the Constitution of the United States and further declares as a matter of law that the Sovereign State of Arkansas or any political entity thereunder, or the inhabitants thereof have the inalienable right to protect themselves, their property and effects, against  
 459 flood waters at such times as they are threatened with devastating overflow unless and until said states had by proper enactment of law by its duly constituted legislative authority surrendered such authority to the Federal Government. Pollard vs. Hagan, 3 Howard 212, 219.

6. The Court declares the law to be that Section 4 of the Flood Control Act of May 15, 1928, provided procedure for

the acquirement of land to be used under the contemplated project and provided that such lands should be acquired by the Secretary of War by condemnation in the United States District Court in the District where the said property was located and that under said Act the Secretary of War has the discretion as to when such proceedings will be brought, and the necessity therefor. And the Court further declares that such provision relative to the condemnation of land and rights-of-way governs proceedings of such nature to the exclusion of other State or Federal enactments, and the Court further declares that before an action at law for a taking can be maintained it must appear that the Secretary of War has abused the discretion placed within him by the Flood Control Act or that the land owner has been deprived of his property or the protection thereto, or that his premises have been invaded and appropriated by some overt act done by some agency of the Federal Government. U. S. vs. Gideon Anderson (D. C. Mo. 1936) 16 F. Sup. 627.

7. The Court declares that the Flood Control Act of May 15, 1928, was designed and intended as an act to cooperate with the states and local interests for the control of floods rather than to supersede state dominion over levees and drainage projects and that the passage of said Act by Congress was but an enabling act to permit the Federal Government to participate with and assist such local interest in the project of flood control and did not render functis officio the levee boards under whose jurisdiction the various river front levees had been constructed and the Court further declares the law to be that such levee boards within their respective levee districts are enjoined with the same duties, privileges and responsibilities that existed prior to the passage of said Act. Snowden vs. Red River, etc. 134 So. 589, Cert. Dism. 284 U. S. 592, Section 2 Flood Control Act of May 15, 1928.

8. The Court finds that although the Flood Control Act of May 15, 1928, provides for a floodway down through the Boeuf Basin, with a fuse plug levee at the head thereof to be overtopped when a stage of 60.5 feet is reached at Arkansas City, and that the levees above and below and on the opposite side of the river would be raised three feet above said fuse plug levee, permitting the waters of the Mississippi River in excess of its capacity to escape the flow down through said Boeuf Basin.

The Court further finds that as a matter of law the plaintiff



waters over and across plaintiff's land. Additional flood waters as used in the Act of May 15, 1928, is declared to be flood waters that may be diverted from the main channel of the river by lowering the levees at the head of the basin, and withdrawing protection that has heretofore existed.

Marion and Rye Valley Ry. Co. v. United States, 270 U. S. 80; 46 Sup. Ct. 253, 70 L. ed. 585.

Joslin Mfg. Co. v. City of Providence, 262 U. S. 668; 67 L. ed. 1167.

Coleman v. United States, 181 Fed. 599, 603.

Salt Lake City v. East Jordan Irr. Co., 121 Pac. 592, 595.

9. The Court declares as a matter of law that it is the design and intent of the United States to abandon the construction of the so called Boeuf Floodway or their use thereof as provided for under the terms of the Act creating same May 15, 1928, when Congress adopted the revised and amended plan of the Act of July 15, 1936, and the Court further declares that the Secretary of War and Chief of Engineers are without authority to proceed further with the use or construction of the so called Boeuf Floodway as provided for by the Act of 1928.

10. The Court finds that the Engineering Plan adopted by Congress and as set out and explained by the Chief of Engineers in his report contained in House Document 90, contained several projects affecting different parts of the alluvial valley and that each project was a separate entity and

The Court declares as a matter of law that work on or the completion of any separate entity included in the general plan submitted by the Chief of Engineers in House Document 90 was of and in itself an independent and separate project.

11. The Court declares as a matter of law that Congress by its action subsequent to May 15, 1928, and by the passage of the Act of June 15, 1936, abandoned the Boeuf Floodway and substituted therefor the Eudora Spillway, and further declares that the Secretary of War nor the Chief of Engineers can since the adoption of the subsequent legislation proceed with the construction as provided for under the Act of May 15, 1928.

12. The Court declares as a matter of law that work done under the authority of the Flood Control Act and upon the adopted project at other places other than the western section of the middle division cannot be construed as the same

Further declares as a matter of law that said plan is divided into various projects and work upon one project of said plan cannot be construed as a taking of territory or lands or property at some other section where no work is being done.

13. The Court declares the law to be that Secretary of War and Chief of Engineers were acting within the scope of their authority under the law in aid of flood control and navigation in the creation and construction of the cut-offs within the main channel of the Mississippi River, as testified to by the various witnesses for the defense, and further declares as a matter of law that such cut-offs are now a part and parcel of the general engineering plan to facilitate the escape of flood waters through confining same to the main channel of the Mississippi River.

14. The Court declares the law to be that the Act of May 15, 1928, made it discretionary where and when the Secretary of War and the Chief of Engineers would commence condemnation proceedings for all purposes contemplated by said Act. (U. S. v. Stubbs, 35 Fed. (2) 357) and the Court declares further that it was within the discretion of said officials of the United States whether or not condemnation proceedings should be brought for the land within the Boeuf Basin and further declares that a failure to bring such action did not of itself, under the evidence in this case amount to a taking in law.

U. S. v. Stubbs, supra.

U. S. v. Gideon Anderson (Mo. 1936) 16 F. Sup. 627—In re condemnations etc. 266 Fed. 105.

Mullen v. U. S. 140 U. S. 240.

15. The Flood Control Act of May 15, 1928, vests the Secretary of War to determine when proceedings are to be instituted to condemn easements and land in carrying out the Flood Control projects. In determining where the necessity exists to institute such proceedings attention must be given to considerations other than the amount of compensation to be paid. The statute having given the Secretary of War the discretion to act, he alone is to determine where the necessity therefor exists in re condemnation for Imp. etc. Cases cited above.

16. The Court declares the law to be that the filing of condemnation proceedings for land to be used for the construction of levees within the so called Boeuf Floodway was of itself not a taking within the purview of the Fifth Amend-

ment to the Constitution of the United States, and the Court further declares that the Secretary of War and Chief of Engineers or those acting under their supervision and authority were acting within their rights in the dismissal of any condemnation suit which had been instituted to acquire land within the Boeuf Floodway if such action was taken in the dismissing of said suit prior to final judgment therein and the fixing of a value to said premises and before the land owner's right to compensation had become vested.

Nixon v. Marr—190 Fed. 913.  
 Benedict v. N. Y. 98 Fed. 789.  
 Dist. of Columbia v. Washington Steel 43 Appl. 344, 20 C. J. Sec. 458.

17. The Court declares as a matter of law that the United States is not liable for any injury that was in its nature indirect and consequential for which no implied obligation on the part of the Government can arise,

Franklin v. U. S. 16 Fed. Supp. 260 L. C.  
 Kirk v. Goode 13 Fed. Supp. 1020.  
 Manigoult Springs etc. 199 U. S. 473.  
 Gibson v. U. S. 166 U. S. 269.  
 Bedford v. U. S. 192 U. S. 217.  
 Northern Transportation Co. v. Chicago, 99 U. S. 635.  
 Jackson v. U. S. 230 U. S. 1.  
 Horstmann Company v. U. S. 257 U. S. 138.  
 Coleman v. U. S. 181 Fed. 599.

And the Court further declares that if the passage of the Flood Control Act creating a general plan of flood control had any depressing effect whatever upon the market value of plaintiff's land and lands similarly situated that in itself did not constitute such a damage for which the United States was liable but that if such damage did exist it was of a consequential and anticipatory and speculative nature and is *damnum absque injuria* and for which the United States is not liable, citing cases *supra*.

18. The Court declares the law to be that, before there can be a recovery against the United States government for taking of private property for public use under the Fifth Amendment of the Constitution, there must be an actual physical invasion of or an encroachment upon private property by the Sovereign, or there must be such a constructive invasion as amounts to a practical ouster of claimant's possession; and before the plaintiff in the instant case can recover, she must show that there has been an actual invasion of her land amounting to an ouster, an overflow of

such permanent character as to imply an intent to take, and a correlative obligation to pay for the lands so taken.

*Jackson v. United States* 47 Ct. of Cls. 579, 613; id, 230 U. S. 1.

*Peabody v. U. S.* 43 Ct. Cls. 5; id, 231 U. S. 530, 539.

*High Bridge Lumber Co. v. U. S.* 69 Fed. 320.

*Manigault v. Springs*, 199 U. S. 473; 26 Sup. Ct., 127.

19. A claimant may not maintain and recover in an action against the Government under the Tucker Act for a taking of his property except upon an implied contract on the part of the Government to pay therefor: and to give the Court jurisdiction there must be a contract that is implied in fact and not based merely on equitable considerations and implied in law.

*Alabama v. U. S.* 282 U. S. 502; 51 Sup. Ct. 225.

*Sutton v. U. S.* 256 U. S. 575; 41 Sup. Ct. 263.

*B. & O. Ry. Co. v. U. S.*, 261 U. S. 596; 43 Sup. Ct. 384.

*U. S. v. Minn. Mutual Invest. Co.* 271 U. S. 212.

20. The Court declares the law to be that the United States is not liable in damages to the plaintiff for the raising or changing the levees on the opposite bank of the Mississippi River where such changes had for their purpose the better control of the flood waters or the retention of said river within its natural channel.

*Jackson v. U. S.*, 230 U. S. 1.

*Franklin v. U. S.*, 16 Fed. Supp. 253.

21. The Court declares the law to be that the United States Government is not liable under the Tucker Act for damages caused by overflow due to accidental and extraordinary floods that may be the result of work done in the improvement of its navigable rivers, especially where no work was done in the channel of the river to cause such flood, such as the construction of locks and dams to interfere with its flow.

465 *Cubbins v. Mississippi River Comm.* 241 U. S. 357; 60 L. ed. 1041, 36 Sup. Ct. 671.

*Jackson v. United States*, 230 U. S. 1; 57 L. ed. 1363, 35 Sup. Ct. 238.

*Bedford v. United States*, 192 U. S. 217.

*Hughes v. United States*, 192 U. S. 217; 40 L. ed. 414.

22. The Court declares as a matter of law that the United States cannot be held to respond in damages for any spec-



Floodway, and that if the State of Arkansas or any of the Road Districts therein have at any time changed, altered, or desisted in highway improvement because of the adoption of the Flood Control Act of May 15, 1928, the said United States cannot be held to answer in damages to the property owners therefor.

Franklin v. U. S., 16 Fed. Supp. 260 L. C.

Kirk v. Goode, 13 Fed. Supp. 1020.

Manigault Springs, etc., 199 U. S. 473.

Gibson v. U. S., 166 U. S. 269.

Bedford v. U. S., 192 U. S. 217.

Northern Transportation Co. v. Chicago, 99 U. S. 635.

Jackson v. U. S., 230 U. S. 1.

Horstmann Company v. U. S., 257 U. S. 138.

Coleman v. U. S., 181 Fed. 599.

23. The Court declares as a matter of law that if any local agents such as the Highway Commission, the Department of Health, have withdrawn improvements, attention, and supervision from the so-called Boeuf Floodway because of the passage of the Flood Control Act of May 15, 1928, and the selection of said territory as a part of the engineering plan as a floodway that such action on the part of the local or state government is decreed and declared to be anticipatory of future damages and if the territory and lands therein have decreased in valuation due thereby, such damages are of a consequential, anticipatory and speculative nature for which the government of the United States is not liable, and the plaintiff herein cannot recover for any part thereof. Cases cited above.

24. The Court declares as a matter of law that it is controlled by the language of the statute rather than by discussions in Congress or evidence taken before congressional committees or individual opinions of the authors of public documents, and advert to these proceedings only as they seem to confirm the intent of Congress as expressed in an Act or any section thereof, U. S. v. Hess, 466 71 F. R. (2d) 80 L. C., and the Court further declares as a matter of law that such debates, testimony, or expressions of opinion as to the effect of flood waters within the Boeuf Basin cannot be received as proof of the issues involved in this case nor may they be considered by the Court as evidentiary matter, and the Court declares that the comments, explanations and elucidations contained in the Engineer's Report published in House Document 90 are no part of the Engineering Plan adopted by Congress and that the same cannot be re-

ceived as evidenciary matter and cannot be considered by the Court as such.

25. The Court declares as a matter of law that the interpleaders have no interest in or claim to the land of the plaintiff; that the assessments made against her land to meet bond maturities and interest are due annually and are payable to the district and that said assessments are a lien upon her land in favor of the district or districts in which it may lie, and there is no lien thereon in favor of the interpleaders or either of them, and they have no cause of action against the defendant government by reason of the default of any such district or districts in the collection of annual assessments and applying same to the payment of bond maturities and interest.

Mullen Development Co. vs. U. S., 290 U. S. 89;  
Omnia Com. Co. vs. United States, 261 U. S. 502.

26. The Court declares as a matter of law that, if the interpleader districts, the Cypress Creek Drainage District and the Southeast Arkansas Levee District have been unable to collect sufficient assessments due on land in their respective districts since 1928 to meet bond maturities and interest, and if such inability to collect such assessments has  
467 been due to the fear of landowners in the respective districts that their land would be flooded by reason of flood from the Mississippi River on account of the Flood Control Act of May 15, 1928, this loss if any, is not due to any act on the part of the United States Government or of its officers, agents, or/and employees, but is wholly due to a fanciful and speculative apprehension and is consequential and does not constitute an element either of damage or a taking.

Peabody vs. United States, 231 U. S. 530;  
Portsmouth Harbor vs. U. S., 277 U. S. 603;  
Sanguinetti vs. U. S., 269 U. S. 146;  
Bedford vs. United States, 192 U. S. 217;  
Jackson vs. United States, 230 U. S. 1.

Whereupon, the Court took the cause under advisement and on October 21, 1937, filed the following

(Opinion of District Court.)

Davis, J.

This action was instituted under the Tucker Act, 28 USCA

property for a public purpose. Plaintiff owns forty acres of land in Desha County, Arkansas, the fair market value of which, it is alleged, was reduced from \$5000 to \$1000 as a result of the establishment of the Boeuf Floodway, which included plaintiff's property, under authority of the Flood Control Act of May 15, 1928: 33 USCA 702a—702m.

The Interveners were made parties upon motion of defendant.

The answer of defendant asserted (1) that the enactment of the Flood Control Act created no express or implied obligation to compensate plaintiff, or that any act of the Government done under authority of the said statute constituted a taking of plaintiff's property; and (2) that the Boeuf Floodway had by a subsequent Act of Congress been abandoned and the Eudora Floodway substituted in lieu thereof.

Following a destructive flood in 1927, Congress authorized the execution of an extensive flood control program in the Mississippi Valley, from Cape Girardeau, Missouri, to the Head of the Passes in Louisiana. The Flood Control Act adopted a plan suggested by the Chief of Engineers, commonly called the "Jadwin plan", as the same was set out in Document number 90, House of Representatives, 70th Congress, 1st Session. That portion of the plan of immediate concern in this case deals with the suggested treatment of the Mississippi River from the White and Arkansas Rivers, on the north, to the Red River, on the south, usually referred to as the "middle section".

#### 1. House Document No. 90:

"117. *Old River to the Arkansas*.—The flood of 1927 rose 60.5 on the Arkansas City gauge. It has been estimated that had it been confined and crevasses not occurred the gauge height would have been 69. The top of the present levee is 60.5. To take care of this flood with proper freeboard would require present levees to be raised about 12 feet. Such an increase in levee height would greatly intensify the disaster resulting from an accidental failure of a levee, besides being inordinately costly. Nor would they be safe, for it has been estimated that floods might come which would produce, if confined, stages of over 74 feet. It is obvious that no attempt should be made to raise levees to such a height. The practical remedy is to raise the levee grade 3 feet on both sides of the Mississippi below the Arkansas River, to strengthen these levees so that they will not fail from causes other than accident or overtopping, and to preclude overtopping by insuring that the water in excess of the capacity of the leveed channel be spilled out near the mouth of the Arkansas.

"118. To insure that excess water will leave the main river, a fuse plug section of the levee in the vicinity of Cypress Creek must be kept at its present strength and at its present grade, viz., 3 feet below the new levee grade. This relatively weak section will be long enough to discharge the greatest predicted possible excess water over and above the capacity of the leveed river below. In order to limit the land in the Tensas Basin overflowed

469 During periods of unusually high water in the Mississippi River, the stress on the levee system was increased at the mouth of the Arkansas and the White River. The levees in that vicinity did not withstand the flood waters of 1927, but crevasses at Medford, and Pendleton on the south side of the Arkansas, and at Mounds Landing on the east side of the Mississippi. To protect against floods approximating or equaling that of 1927, it was conceived to be necessary to relieve the riverside levees by diverting a substantial portion of the water from the channel of the river into a designed floodway.

The Jadwin plan made provision for a floodway starting shortly south of the mouth of the Arkansas River, at Cypress Creek, thence southwardly along the basin of the Boeuf River to the backwater area of the Red River in the State of Louisiana. The source of this floodway, as planned, extended along the levee on the west side of the Mississippi River from Rohwer to Luna Landing, a distance of thirty miles.

The essential features of the proposed floodway, as they were set forth in the plan adopted, were (1) a section of the riverside levee at Cypress Creek, designated a fuse plug, across the upper end of the floodway, of less height than the contiguous levee, ~~on~~ the levee on the opposite side of the river; this was to be provided by leaving intact and unaltered the then existing riverside levee, built and maintained at the 1914 grade and section, as established by the Mississippi River Commission. The grade of this fuse plug section was equivalent to 60.5 feet on the gauge at Arkansas City. When the river reached that stage, the water

natural ridges do not serve, from the Cypress Creek levee to backwater in the lower Tensas Basin. Arkansas City is to be inclosed with a levee. This floodway will be wide enough to carry the water without clearing and without maintenance except for the side levees. It is unwise to attempt to limit the volume of flow that may possibly enter the floodway to a narrower floodway that might prove of insufficient capacity. A narrower floodway cleared of timber was considered, but the clearing was found to be unwarrantably expensive in first cost and maintenance for the increased efficiency of discharge produced thereby. It will be much better to let the land be gradually cleared as it is developed for use. At some future time, the development of the region may warrant the first cost and maintenance of a cleared floodway of less width.

"119. The Boeuf River bottom is selected for this diversion because it is the most suitably located to receive the water, is the most direct route, has the best width, and covers largely undeveloped swamp land. Water will not top the Cypress Creek fuse plug levee and go down the floodway until it is so high that it must find an outlet. No flood except that of 1927 has reached such a stage. However, due to an increase in flood heights by reason of levee construction and drainage, it has been estimated that a stage over the present levee top at Cypress Creek might occur in the long run about once in 12 years. The lands in the floodway will be inundated only by floods that would overtop the present levee system, and they will retain the same measure of protection that they now have."



would run over the levee and into the floodway. (2) The grade of the riverside levees above and below the fuse plug section, as well as that on the east side of the river, was to be raised three feet, to effect the entry of excess flood water into the floodway. (3) A system of guide levees, on the east and the west side of the floodway to hold the water in the designated channel, and prevent it from spreading out on the lands on either side.

The Floodway Act created a board to adjust engineering differences between the adopted project and the plans suggested by the Mississippi River Commission, and to make recommendations to the President. The decision of the President on such matters was to be final. This decision was made on January 10, 1929, in a communication to the Secretary of War, in which he approved the construction of the levees in the Boeuf Floodway.

471 The execution of the flood control program was commenced in 1929, and has been continued to the present time. When this suit was filed in August, 1934, the status of the contemplated work in the middle section was this: the levee, for a distance of about sixty miles, from Yancopin, on the south bank of the Arkansas River, to Vanclose, on the west bank of the Mississippi, remained at the 1914 grade and section. This not only included the fuse plug section, but also about fifteen miles of the original levee, both above and below the fuse plug section. The riverside levee, above and below the sixty mile Cypress Creek gap, had been raised about three feet to the 1928 grade and section, and the levee on the east bank of the Mississippi had likewise been raised to the new grade.

The reason that the long gap of the old levee was left intact, instead of merely the fuse plug section, is to be found in a provision of the Flood Control Act, to the effect that, pend-

2. The President approved in the following language:

"Washington, January 10, 1929.

"Supplementing my approval of August 13, 1928, of the report of the board provided for in section 1 of 'An Act for the control of floods on the Mississippi River and its tributaries, and for other purposes,' approved May 15, 1928, which approval excepted and reserved for future action those parts of the report which contemplated the acquiring of rights in land for constructing spillways and floodways, the construction of the protection levees in the Boeuf Basin, as provided for in the adopted project, is approved.

"Land for rights-of-way for these levees will be secured by condemnation as authorized by law, provided that those lands may be purchased, when they can be thus secured at reasonable prices, which shall not in any case exceed two and one-half times the assessed valuation of the present time.

(Signed) CALVIN COOLIDGE."

ing completion of the floodway, lands within it are to have the same protection as lands on either side.<sup>3</sup>

The Government did not proceed with the construction of the Boeuf Floodway on account of "local opposition".<sup>4</sup> In fact, its progress was enjoined.<sup>5</sup> The Committee on Flood

472 Control of the House of Representatives, on January 28, 1932, requested the Chief of Engineers to review the status of the works then in progress with the view of determining whether modifications should be made in the plan. The response was the report of the Chief of Engineers, dated February 12, 1935.

This report contained a complete review of the progress of the flood control program, and recommended the amendment of the Act of May 15, 1928, in certain instances, one of which affected the plan as applied to the "middle section" of the river. This recommendation was that the Boeuf floodway as provided in the Jadwin plan be abandoned, and the Eudora floodway be substituted in lieu thereof. The suggested new floodway to have its source on the west side of the Mississippi River, near the town of Eudora, Arkansas, about one hundred miles south of the mouth of the Arkansas River. A back protection levee was to extend from the head of this floodway to the Arkansas River. The pertinent section of the report of the Chief of Engineers is printed in the footnote.<sup>6</sup>

3. Section 702a—" \* \* \* provided further, that pending completion of any floodway, spillway, or diversion channel, the areas within the same shall be given the same degree of protection as is afforded by levees on the west side of the river contiguous to the levee at the head of said floodway \* \* \*"

4. Report of Chief of Engineers, February 12, 1935, Flood Committee, Document No. 1, House of Representatives, 74th Congress, 1st Session:

"9. All parts of the project works in the middle section, except the Boeuf Floodway and the raising of the main river levees adjacent to its head, have in general been completed. Because of local opposition the construction of the Boeuf Floodway levees has not been undertaken \* \* \*"

5. *Kincaid v. United States* (C. C. A. 5) 49 P. (2d) 768; reversed, *Hurley, Secretary of War v. Kincaid*, 285 U. S. 95.

6. Report of Chief of Engineers, February 12, 1935, Flood Committee Document No. 1, House of Representatives, 74th Congress, 1st Session:

"11. I recommend that the project for the flood control of the Mississippi River in its alluvial valley and for its improvement from the Head of the Passes to Cape Girardeau, authorized by the Flood Control Act of May 15, 1928, be amended substantially as recommended by the Mississippi River Commission in its report dated January 19, 1935, to provide:

"(1) The abandonment of the Boeuf Floodway, and in lieu thereof the construction of the Eudora Floodway, west of the Mississippi River extending from the latitude of Eudora into the Red River backwater area, with a control structure at its head.

"(2) A back-protection levee extending from the head of this floodway north to the Arkansas River, so located as to afford adequate space for the escape of flood waters without endangering the levees on the east side of the river.

"(3) The maintenance of the present river levees between the head of the Eudora Floodway and the northern junction with the protection levee, at the 1914 grade and section, except in front of densely populated areas, as a part

473 Congress adopted the recommendations of the Chief of Engineers by the passage of the Overton Bill, approved June 15, 1936. 33 USCA 702a-1 to 702-10.<sup>7</sup> The plan of flood control thus provided for the section of the valley from the Arkansas River to the Red River is commonly referred to as the Markham plan.

A detailed description of the Eudora floodway or its operation is not conceived to be necessary in this case. Its general course is much the same as the Boeuf Basin, but it clings closer to the west bank of the Mississippi, passing on the east side of Macon Ridge, and terminates in the backwater area of the Red River.

The total acreage of the Boeuf Floodway is approximately 1,326,000 acres. In the Eudora floodway, there are 702,000 acres. The northern extension of this floodway to the Arkansas River would add 119,000 acres, making a total acreage of 821,000.

474 The plaintiff's land is also in the Eudora floodway, but reliance is not placed upon that fact in this case.

The Mississippi River between the Arkansas and the Red Rivers, follows a very winding course. There are levees on either side, but in the main, these levees are many miles apart. Between those levees, the river winds back and forth from east to west, and west to east, forming loops, known as the Greenville Bends, while the general course of the stream is to the south. During the progress of the execution of the flood control program, the Government has undertaken to

<sup>7</sup> Act of June 15, 1936, sections 1 and 2:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the project for the control of floods of the Mississippi River and its tributaries, adopted by Public Act Numbered 391, approved May 15, 1928 (45 Stat. 534), Seventieth Congress, entitled "An Act for the control of floods on the Mississippi River and its tributaries, and for other purposes," is hereby modified in accordance with the recommendations of section 43 of the report submitted by the Chief of Engineers to the Chairman of the Committee on Flood Control, dated February 12, 1935, and printed in House Committee on Flood Control Document numbered 1, Seventy-fourth Congress, first session, as hereinafter further modified and amended; and as so modified is hereby adopted and authorized and directed to be prosecuted under the direction of the Secretary of War and the supervision of the Chief of Engineers.

"Sec. 2. That the Boeuf Floodway, authorized by the provisions adopted in the Flood Control Act of May 15, 1928, shall be abandoned as soon as the Eudora Floodway, provided for in Flood Control Committee Document Numbered 1, Seventy-fourth Congress, first session, is in operative condition and the back-protection levee recommended in said document, extending north from the head of the Eudora Floodway, shall have been constructed."

straighten the channel and increase its discharge capacity, by making a series of "cut-offs", thus eliminating some of the bends. Eleven of these cut offs have now been made, and a system of dredging installed to protect and improve the channel of the river. The engineers refer to this program as channel stabilization. The distance by river from the Arkansas to the Red Rivers was 372.3 miles, and by reason of the cut offs it has been shortened 100.6 miles."

475 One purpose of this program is to increase the discharge capacity of the river. The engineering witnesses at the trial were in accord on the fact that as a result of this program the flood level of the river in the vicinity of the Cypress Creek gap was lowered during the flood of February, 1937. But there was disagreement among the engineers as to whether this effect was temporary or permanent, and as to whether this practice was sufficiently free from hazard as to be advisable.

It was also contended by the plaintiff that the making of the cut-offs was not in accord with the Jadwin plan, and hence of no concern in this case."

8. Report of Chief of Engineers, Committee on Flood Control, Document No. 1:

"10. The course of the Mississippi River in the middle section is generally tortuous, especially through the Greenville Bends, a series of wide loops below the mouth of the Arkansas. With a view to increasing its flood discharge capacity, experimental work on a large scale has been undertaken in the rectification of the channel by cut-offs. This rectification through the Greenville Bends, by the forces of nature or by design, may so lower the local flood heights that the fuse-plug levees at the head of the Boeuf Floodway will carry more than the safe capacity of the river below them."

9. House Document No. 90:

"69. *Straightening channel*—Artificial or natural cut-offs shorten the reach where they occur and by increasing the slope and velocity produce a local lowering of the flood stage. However, the increased velocities immediately cause excessive bank caving either in the reach or near it, and the river eventually lengthens itself with new bends. The changes in the channel cause great damage and expense. The bank revetment now in use, expensive as it is, has not been subjected to and withstood such velocities as would be caused by cut-offs. Low-water navigation in any stretch is likely to be temporarily destroyed by bars created by the excessive bank caving caused by a cut-off. The method is too uncertain and threatening to warrant adoption.

"70. In an unsettled region and on an unleveed alluvial stream a program of cut-offs and bank protection, begun at the lower end of the river and progressing upstream, might be desirable in anticipation of settlement of the region." But such a condition is not hypothetical. In the present case, the river banks are not yet revetted to the extent necessary for shortening of the stream, nor will they be for years; levees are already in place, though not to final height, conforming to the river in its present shape; valuable cultivated land would be lost, and landings and towns along the river would be cut off from navigation. Completion of the levees needed for protection can not be postponed until a cut-off and revetment project could be carried out.

"71. It is advisable to adhere to the present policy of preserving the river generally in its present form and not to undertake a plan of flood control or of improvement for navigation that involves the formation of cut-offs."



476 The defendant, on the other hand, contended that channel stabilization, which includes the making of cut offs, was an integral part of the flood control plan.<sup>10</sup>

It must be clear that the original flood control plan did not essentially have as its basis a program of channel straightening by means of cut offs. The hazard of this practice was clearly set out in the engineering report of the plan. On the other hand, this project, and the statute directing its execution arose out of the impetus of the most disastrous flood that ever visited the valley. A ten year program was undertaken. The plan adopted was only in outline. Discretion as to the details of execution was vested in the Secretary of war.<sup>11</sup> If experience in the carrying out of the pro-

477 ject dictated that a system of cut off be adopted, with the view of improving the channel of the river, and in-

10 House Document No. 90:

"147. I recommend the adoption and authorization of a comprehensive project for the flood control of the Mississippi River in its alluvial valley and its improvement from the Head of the Passes to the Ohio River as set forth in this document, to be prosecuted under the direction of the Secretary of War and the supervision of the Chief of Engineers; the project to include the floodways, spillways, levees, channel stabilization, mapping, etc., hereinbefore recommended, with such modifications thereof as in the discretion of the Secretary of War and Chief of Engineers may be advisable, and the maintenance of a navigation channel from Cairo to New Orleans not less than 300 feet in width and 9 feet in depth \* \* \*"

"131. Channel stabilization.—Since the levees within the limits of this project are to be greatly enlarged, they will be much more expensive than heretofore, so something must be done to avoid the frequent moving of them from the proximity of caving banks. In addition, the river can not be regulated for low-water navigation until the banks are made stable, this both to keep the channel in one place and to stop the enormous dumping of earth into the river by bank caving. A general bank-protection scheme must be carried out. This will consist of revetting banks by proven methods and in addition trying new and cheaper methods to accomplish the same result. At the same time regulation of kind which has been successfully accomplished above Cairo will be undertaken below when and where the banks become stable. The plan includes a 10-year program of channel stabilization and river regulation at a total cost of \$110,000,000, or \$11,000,000 per year. This program may need revision upward after some years, as the rate and total amount of work above contemplated is a minimum."

11 House Document No. 90:

"138. Program of work.—The project is to be completed within ten years. Twenty-five million dollars can be advantageously expended the first year and approximately thirty million dollars each year thereafter until the project is completed.

"139. Execution of plan.—The plan herein recommended is general in its scope. It is recommended that the responsibility for the execution of the plan, the details of the design, and location of the engineering works and structures be placed upon the Chief of Engineers under the supervision of the Secretary of War, as is done by acts of Congress in the case of river and harbor improvements."

creasing its discharge capacity, nothing can be more certain than authority so to do may be found in the Jadwin Plan.

The flood of January and February, 1937, when the Mississippi River reached its highest recorded stage at Cairo and Memphis, the gauge at Arkansas City was 53.87 feet. This was 6.63 feet below the point at which the fuse plug would have been overtopped. This was in part due to the channel stabilization program carried on by the Government, which reduced the flood level in the fuse plug section, and lessened the hazard to which plaintiff's property was subject.

The nature of the flood control plan, and the progress that has been made in its execution, have been set out in some detail, because it is conceived that this case must turn upon the factual situation.

The "Tucker Act vests this court with jurisdiction to entertain certain claims against the United States "upon  
478 contract, express or implied". If an obligation to pay exists in this case, it is upon an implied contract. If the acts and conduct of the Government and its agencies have deprived the plaintiff of her property, then reason and justice dictate that an agreement to compensate be implied.

The United States has consented to be sued, but this authority is not to be broadly construed. The courts have announced a well defined doctrine as to the character of act affecting private property, that will create an implied contract on the part of the government to compensate the owner, and upon which the owner may have a recovery in a suit at law, under the Tucker Act. That doctrine may be ascertained from a consideration of the decisions. The cases are summarized merely for the purpose of finding out the character of act on the part of the government that gives rise to an implied agreement to compensate the owner of the property affected.

In each of the following cases it was held that the facts alleged or proved showed that there was a taking of property: where construction of a dam at Great Falls in the Potomac by the government caused water to back up on plaintiff's island, and also deprived plaintiff of valuable water rights;<sup>12</sup> where a dam was so constructed as to interfere with the natural flow of the water in a stream, causing the water level to be raised and the plaintiff's land to be con-

12. *United States v. Great Falls Mfg. Co.*, 112 U. S. 645; *Great Falls Mfg. Co. v. Attorney-General*, 124 U. S. 581.

continuously overflowed, rendering it unfit for agricultural purposes;<sup>13</sup> where the government constructed a dam and lock which raised the water level in the Cumberland River above its natural stage to the extent that lands not theretofore subject to overflow were frequently covered with water;<sup>14</sup> where a dam was built across the Fox River, raising the water level so that plaintiff's land was continuously overflowed by back water;<sup>15</sup> where erection of a dam caused water to back up and cover a part of plaintiff's land, preventing egress and ingress;<sup>16</sup> where plaintiff's farm was subjected to increased overflow by backwater from a dam erected eight miles below;<sup>17</sup> where a dam, erected to improve navigation on the Muskingum, caused a permanent overflow of claimant's land;<sup>18</sup> where erection of a lock and dam caused water to completely cover a highway built and maintained by Wayne County, Kentucky;<sup>19</sup> where plaintiff's mining claim in Alaska was permanently occupied by the United States Army as a camp;<sup>20</sup> where the government built a Naval Training Station on land over which plaintiff has an easement, forever depriving him of its use;<sup>21</sup> where a Fort was established on a tract adjacent to plaintiff's land on which he operated a summer resort, and guns were repeatedly fired by the government, sending projectiles over plaintiff's property.<sup>22</sup>

It will be observed that in each of these cases there was an actual invasion of private property, or an immediate interference with the use and enjoyment of the same.

480 The doctrine of these and other decisions on the subject is that where the government, in the exercise of its

13. *United States v. Lynch*, 188 U. S. 445; *United States v. Williams*, 188 U. S. 485.

14. *United States v. Cress*, 243 U. S. 316.

15. *Pumpelly v. Green Bay Co.*, 13 Wall. 166.

16. *United States v. Welch*, 217 U. S. 333; *United States v. Sewell*, 217 U. S. 601; *United States v. Grizzard*, 219 U. S. 180.

17. *Jacobs v. United States*, 290 U. S. 13.

18. *Merriam v. United States*, 29 Ct. Cls. 250.

19. *Wayne County, Kentucky v. United States*, 53 Ct. Cls. 417.

20. *United States v. North American Company*, 253 U. S. 330.

21. *Tucker v. United States*, 283 F. 428.

22. *Portsmouth Harbor Land & Hotel Company v. United States*, 260 U. S. 327.

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functions, for the promotion of some public undertaking, actually invades private property, or places some burden, not merely of a temporary character, upon the possession, use and control of said property, there is a taking, and a promise to compensate the owner will be imputed to the United States.

The United States Supreme Court, in a recent case,<sup>23</sup> stated the law as follows: "in order to create an enforceable liability against the Government, it is, at least, necessary that the overflow be the direct result of the structure, and constitute an actual, permanent invasion of the land, amounting to an appropriation of and not merely an injury to the property."

Action on the part of the Government, not directly encroaching upon private property, but which imposes a temporary, occasional, or incidental injury, and impairs its use is regarded as a consequential damage, and does not amount to a taking.<sup>24</sup>

It is not contemplated or prospective encroachments that give rise to the obligation to compensate. It is acts performed that constitute a taking, and form the basis of an implied promise to pay.

Judge Faris said, in *United States vs. Chicago, Burlington & Quincy Railroad Company*:<sup>25</sup> "many cases are to be found holding that no damages can be recovered under the Tucker Act when no part of the land of plaintiff is actually touched or actually taken." Since this case is relied upon by plaintiff, it may be here mentioned that it was a condemnation suit, and the question was what constituted just compensation, the taking of the property not being in issue; while the question here is what constitutes a taking.

In *Hurley v. Kincaid*,<sup>26</sup> the court declared that a landowner in the Boeuf Floodway could not enjoin the receiving of bids for the construction of the guide levees, because "if that

23. *Sanguinetti v. United States*, 264 U. S. 1 c. 149.

24. *Bedford v. United States*, 192 U. S. 217; *Gibson v. United States*, 166 U. S. 269; *Boothwell v. United States*, 254 U. S. 231; *Peabody v. United States*, 231 U. S. 530; *Portsmouth Harbor Land & Hotel Co. v. United States*, 250 U. S. 1; *Manigault v. Springs*, 199 U. S. 473; *Salliotte v. King Bridge Co.*, 122 F. 378; *Coleman v. United States*, 181 F. 599; *Wharton v. United States*, 153 F. 876.

25. 82 F. (2d) 1 c. 137.

26. 285 U. S. 95.

which has been done, or is contemplated, does constitute such a taking, the complainant can recover just compensation under the Tucker Act in an action at law as upon an implied contract." The court was not called upon to consider the question as to whether there had been a taking. There is nothing in this decision, or in any other case, so far as we are informed, to indicate that the court intended to depart from its well established doctrine as to what constituted a taking. But this case does hold that an owner may not demand compensation prior to the taking.

It is argued that a taking of plaintiff's property was effected by:

(1) The enactment of the Flood Control Act of May 15, 1928;

(2) The Proclamation of the President of January 10, 1929, by which he approved the construction of the protection levees in the Boeuf Basin;

(3) The adoption of a program, and the assumption 482 by the government of the control of the fuse plug section, because of which, it is claimed, the plaintiff is deprived of the right of "self defense" against a threatened flood, and her land decreased in market value;

(4) The act of the government in raising the levee above, below and across the river from the Cypress Creek gap, thereby making it certain that in the event of a flood which the levees would not withstand, plaintiff's land would be covered with water.

It seems to be clearly settled by the adjudicated cases that the passage of a statute, standing alone, does not effect the taking of property. The statute may and is often repealed, and until it has been executed to the extent of appropriating the land, an owner is not entitled to be compensated.<sup>27</sup> In fact, the government is free to abandon the plan to acquire land at any time before that result is actually consummated.<sup>28</sup> The date of the statute is not the time of the taking. In condemnation, the date of the suit, award or the judgment fixes the time of the taking.

The approval of the President to the commencement of the work on the Boeuf Floodway is regarded as particularly sig-

27. *Red v. Little Rock Railway & Electric Co.*, 121 Ark. 71, 180 S. W. 220; *Willink v. United States*, 240 U. S. 572.

28. *Garrison v. City of New York*, 88 U. S. 196; 10 R. C. L. 199.

nificant as fixing the time that the government became obligated to compensate the plaintiff. Attention has not been directed to authority for this position. A railroad contended that the statute authorizing government control, followed by the Proclamation of the President, effected a taking  
483 of its property, but the Supreme Court held that a mere technical taking does not create the right to receive compensation.<sup>29</sup> The recording by public authority of a map of a proposed system of highways within a certain territory, without restricting the use of lands before the commencement of proceedings for their condemnation, did not constitute a taking.<sup>30</sup>

The fuse plug section of the levee has not been disturbed. But plaintiff asserts that the landowner no longer has the same right to protect the levee that formerly existed. The grade of this levee was established by the Mississippi River Commission, acting under authority duly conferred. The landowners, prior to 1928 had no right to elevate the established grade. There is nothing in the Act that restricts the privilege of property owners to participate in a "flood fight" by supporting the river front levee, when it is endangered. They did so participate during the 1937 flood. But even if it were otherwise, that fact would not give rise to the contingency out of which plaintiff would become entitled to the relief sought in this case.

The act of the government in raising the other levees in the vicinity to the 1928 grade, and leaving the prolonged fuse plug section at the 1914 grade, is relied upon as constituting the taking of plaintiff's property. Mention heretofore has been made of the fact that it is not only the Boeuf Floodway  
484 fuse plug that remains at the 1914 grade, but a section of the levee approximately fifteen miles in length, both at the upper and the lower end of the fuse plug proper. So plaintiff's land has the same levee protection as all other alluvial lands in that section. This is not by chance, but by design. The statute so required pending the completion of the floodway. The protection levees for the Boeuf Floodway have not been constructed. Consequently, that floodway is not now and never has been in an operative condition. In the event of extremely high water the overtopping of the river-front levee would not be confined to the fuse plug proper, but might take place either above or below that section. If water

29. *Marion & Rye Valley R. R. Co. v. United States*, 270 U. S. 280.

30. *Bauman v. Ross*, 167 U. S. 1, c. 596.

should come over the levee, it would not be confined to the designed channel, but would cover all land of approximately the same elevation. So the project, in the present stage of execution, is not effective to the end designed, and has placed no burden upon plaintiff's land that is not equally shared by all other similar land in that vicinity. Moreover, it was held in *Jackson v. United States*<sup>31</sup> that raising levees on one side of a river was not, in effect, the taking of land on the other side.

The plaintiff offered much evidence tending to show that the project under consideration had decreased the value of land in the floodway. A satisfactory finding on this subject can hardly be made. It is a fact that the value of land in the Boeuf Basin decreased subsequent to 1928. The plaintiff says this was due to flood control plan. The defendant urges that it was due to high taxes, the depression, the low  
485 price of agricultural products, and was by no means confined to the alluvial lands in southeastern Arkansas. There is no occasion to undertake to determine the extent, if any, to which the project contributed to the decrease in the value of plaintiff's land.

No part of plaintiff's land has been appropriated for use as levee right of way, and no actual entry of any kind or character has been made thereon. No water has been diverted over plaintiff's land, and there has been no overtopping or crevassing of the fuse plug section of the river front levee since the passage of the Act in question. There has been no reduction in the grade of the levee protecting plaintiff's land, and no right acquired or sought to reduce this protection. There has been no interference with the plaintiff's possession, occupancy and use of the said land.

In our opinion, it cannot be successfully contended that plaintiff's land has been appropriated by the defendant, thereby giving rise to an implied contract to compensate the owner.

In view of this conclusion, it is not conceived to be necessary to make any findings as to the intervenors.

The Court adopts Findings of Fact 1 to 49 inclusive, and Conclusions of Law 1 to 23 inclusive, and refuses to adopt Findings of Fact 49 to 57 inclusive, and Conclusions of Law 24 to 26 inclusive, submitted by the defendant.



The Court refuses to adopt Findings of Fact and Conclusions of Law submitted by plaintiff, in so far as they are inconsistent with the Findings and Conclusions herein adopted.

The Court directs that judgment be awarded defendant.

To all adverse rulings herein made, the respective parties are allowed exceptions.

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492 (Approval of Bill of Exceptions by Counsel.)

Come the plaintiffs, Julia Caroline Sponenbarger, Grady Miller as Receiver for the Southeast Arkansas Levee District, Alex H. Bowell and William R. Humphrey, as Receivers for the Cypress Creek Drainage District; Cypress Creek Drainage District; Mercantile-Commerce Bank and Trust Company and Mercantile-Commerce National Bank in St. Louis, and St. Louis Union Trust Company, presenting the foregoing as their Bill of Exceptions as being in complete conformity to the rules of the Court in such cases made and provided, and directing that it be filed as a part of the record in this cause, as by law and the rules of this Court prescribed.

Respectfully submitted,

MRS. JULIA CAROLINE SPONEN-

BARGER, Appellant,

By Lamar Williamson,

Monticello, Arkansas, and

By E. E. Hopson,

McGehee, Arkansas, Her Attorneys.

GRADY MILLER,

As Receiver for the Southeast Arkansas Levee District,

By Joseph W. House,

Little Rock, Arkansas, and

By Lamar Williamson,

Monticello, Arkansas, His Attorneys.

ALEX H. ROWELL and

WILLIAM R. HUMPHREY,

As Receivers for the Cypress Creek Drainage District,

By DeWitt Poe,

McGehee, Arkansas, and

By Lamar Williamson,

Monticello, Arkansas, and

By Hendrix Rowell,

Pine Bluff, Arkansas,

Their Attorneys.

CYPRESS CREEK DRAINAGE DISTRICT.

By DeWitt Poe,

McGehee, Arkansas, and

By Lamar Williamson,

Monticello, Arkansas.



**MERCANTILE-COMMERCE BANK  
AND TRUST COMPANY and  
MERCANTILE-COMMERCE NA-  
TIONAL BANK IN ST. LOUIS,**

By Fred Armstrong, Attorney, of Thomp-  
son, Mitchell, Thompson & Young, St.  
Louis, Missouri.

**ST. LOUIS UNION TRUST COM-  
PANY,**

Individually and in its own right, and  
as Trustee for Bondholders in a pledge  
and mortgage executed by the Cypress  
Creek Drainage District,

By Henry Davis, Attorney, of Bryan,  
Williams, Cave & McPheeters, St.  
Louis, Missouri.

---

Copy of the foregoing Bill of Exceptions received and ap-  
proved this January 7th, 1937.

**FRED A. ISGRIG,**  
United States District Attorney,  
for the defendant.

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494 (Approval of Bill of Exceptions by District Judge.)

I, the undersigned United States District Judge, who pre-  
sided at the trial of the above entitled cause, do hereby cer-  
tify that the foregoing Bill of Exceptions contains all of the  
material facts, matters, things, proceedings, objections, over-  
rulings, and exceptions thereto, occurring upon the trial of  
said cause and not heretofore a part of the record herein, in-  
cluding all evidence adduced at the trial, material to the  
issues presented by the assignments of error, and I further  
certify that the exhibits set forth and included in the fore-  
going Bill of Exceptions constitute all the exhibits offered in  
evidence at the said trial which are material to the issues  
presented by the assignments of error; the Bill of Exceptions  
as a whole containing all of the evidence necessary to present  
clearly the questions of law involved in the rulings to which  
exceptions are preserved; and I hereby make all of said ex-  
hibits a part of the foregoing Bill of Exceptions; and I  
hereby settle and allow the foregoing Bill of Exceptions, as  
a full, true, correct and complete Bill of Exceptions in this  
cause and order the same filed as a part of the record herein,

and further order the Clerk of this Court to attach to  
 495 the said Bill of Exceptions all of said exhibits and to  
 transmit said entire Bill of Exceptions, including all  
 exhibits requested by either party, to the Circuit Court of  
 Appeals for the Eighth Circuit.

Done and dated this 8th day of January, A. D., 1938.

CHARLES B. DAVIS,  
 United States District Judge.

Endorsed: "Filed Jan. 10, 1938. Sid B. Redding, Clerk."

496 (Citation and Acceptance of Service.)

(Filed in U. S. District Court on January 7, 1938.)

In the United States District Court for the Western Division  
 of the Eastern District of Arkansas.

Mrs. Julia Caroline Sponenbarger; Grady Miller as Receiver  
 for the Southeast Arkansas Levee District; Alex H.  
 Rowell and William R. Humphrey, as Receivers for  
 the Cypress Creek Drainage District; Cypress Creek  
 Drainage District; Mercantile-Commerce Bank and  
 Trust Company and Mercantile-Commerce National  
 Bank in St. Louis; and St. Louis Union Trust Com-  
 pany, Appellants.

No. 7984. . . vs.

The United States of America, Appellee.

To the United States of America, and the Honorable Fred A.  
 Isgrig as United States District Attorney, attorney for  
 the defendant:

You are hereby cited and admonished to be and appear in  
 the United States Circuit Court of Appeals for the Eighth  
 Circuit in the City of St. Louis, Missouri, forty days from  
 and after the day this Citation bears date, pursuant to an  
 appeal allowed and filed in the clerk's office of the District  
 Court of the United States for the Western Division of the  
 Eastern District of Arkansas, wherein Julia Caroline Spon-  
 enbarger; Grady Miller as Receiver for the Southeast Ar-  
 kansas Levee District; Alex H. Rowell and William R.  
 Humphrey, as Receivers for the Cypress Creek Drainage  
 District; Cypress Creek Drainage District; Mercantile-Com-  
 merce Bank and Trust Company and Mercantile-Commerce  
 National Bank in St. Louis; and St. Louis Union Trust Com-  
 pany are appellants and the United States of America is ap-

497 pellee, to show cause, if any there be, why the Findings of Fact and Conclusions of Law and Judgments rendered in the above styled action should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Charles B. Davis, United States District Judge, who presided in the trial of the above styled cause in the Western Division of the Eastern District of Arkansas, this 6 day of January, in the year of our Lord, one thousand nine hundred and thirty-eight.

CHARLES B. DAVIS,  
United States District Judge.

Service of the above Citation is hereby accepted and acknowledged this 7 day of Jan., A. D. 1938.

FRED A. ISGRIG,  
United States District Attorney, and  
Attorney for the defendant in the  
above styled cause.

498 (Clerk's Certificate to Transcript.)

In the United States District Court for the Western Division of the Eastern District of Arkansas.

I, Sid B. Redding, Clerk of the District Court of the United States for the Eastern District of Arkansas, in the Eighth Circuit, do hereby certify that the annexed and foregoing writings are a true, correct and complete transcript of the record in the case of Mrs. Julia Caroline Sponenbarger vs. United States of America, No. 7984—at law, as requested by the Praecipe for Transcript filed in said case.

(Seal)  
U. S. Dist. Court  
East. Dist. of Ark.  
West. Div.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at my office in the City Little Rock, State of Arkansas, this 14th day of January, A. D. 1938.

SID B. REDDING,  
Sid B. Redding as Clerk of the District Court of the United States for the Western Division of the Eastern District of Arkansas.

Filed Jan. 15, 1938. E. E. Koch, Clerk.

And thereafter the following proceedings were had in said cause in the Circuit Court of Appeals, viz:

(Appearance of Mr. Lamar Williamson, Mr. E. E. Hopson; Mr. DeWitt Poe, Mr. Joseph W. House, Mr. Fred Armstrong, and Mr. Henry Davis as Counsel for Appellants.)

United States Circuit Court of Appeals, Eighth Circuit

No. 11090

MRS. JULIA CAROLINE SPONENBARGER, ET AL., APPELLANTS

vs.

UNITED STATES OF AMERICA

The Clerk will enter my appearance as Counsel for the Appellants.

LAMAR WILLIAMSON,  
*Monticello, Ark.*

E. E. HOPSON,  
*McGehee, Arkansas.*

DEWITT POE,  
*McGehee, Arkansas.*

JOS. W. HOUSE,  
*Little Rock, Ark.*

FRED ARMSTRONG,  
*St. Louis, Mo.*

HENRY DAVIS,  
*St. Louis, Mo.*

[Endorsed:] Filed in U. S. Circuit Court of Appeals, Jan. 15, 1938.

(Appearance of Mr. A. H. Rowell, Mr. Jay W. Dickey, and Mr. Hendrix Rowell as Counsel for Appellants.)

The Clerk will enter my appearance as Counsel for the Appellants.

A. H. ROWELL,  
JAY W. DICKEY,  
HENDRIX ROWELL.

*Of the firm of Rowell, Rowell & Dickey,  
Pine Bluff, Arkansas*

[Endorsed:] Filed in U. S. Circuit Court of Appeals, Mar. 15, 1938.

(Appearance of Mr. Fred A. Isgrig as Counsel for Appellee.)

The Clerk will enter my appearance as Counsel for the Appellee.

FRED A. ISGRIG,  
*U. S. Atty. East. Dist. Ark.*



[Endorsed:] Filed in U. S. Circuit Court of Appeals, Jan. 19, 1938.

(Appearance of Mr. John C. Dyott as Counsel for Appellee.)  
The Clerk will enter my appearance as Counsel for the Appellee.

JOHN C. DYOTT.

[Endorsed:] Filed in U. S. Circuit Court of Appeals, Jan. 21, 1938.

*Motion of St. Louis Union Trust Company to dismiss the appeal as to it as Trustee, etc.*

Now comes the St. Louis Union Trust Company as the owner of certain bonds issued by the Cypress Creek Drainage District and as Trustee in a mortgage and pledge instrument executed by the Cypress Creek Drainage District on February 1, 1916, and states that after the trial of this cause in the court below and after an appeal taken by it from the judgment rendered by the trial court, the bonds described in the stipulation at pages 292 and 293 of the printed transcript of the record were paid by the said District, said bonds were surrendered to said District and the said mortgage and pledge instrument was satisfied of record.

The St. Louis Union Trust Company therefore states that it, in its capacity as the owner of some of the aforesaid bonds issued by said Cypress Creek Drainage District and as Trustee in the said mortgage and pledge instrument executed by the Cypress Creek Drainage District, has no further interest in this cause.

Wherefore, the St. Louis Union Trust Company moves the Court to dismiss the appeal granted to it as the owner of bonds issued by the Cypress Creek Drainage District and as Trustee in the pledge instrument and mortgage executed by said District.

BRYAN, WILLIAMS, CAVE & MCPHEETERS,  
*Attorneys for St. Louis Union Trust Company.*

Service of the within motion is acknowledged this 18 day of August 1938.

FRED A. ISGRIG,  
*Attorney for Defendant.*

Service of the within motion is acknowledged this 22d day of August 1938.

LAMAR WILLIAMSON,  
*Attorney for Julia Caroline Sponenbarger.*

Service of the within motion is acknowledged this 22d day of August 1938.

LAMAR WILLIAMSON,  
*Attorney for Grady Miller,  
Receiver for Southeast Arkansas Levee District.*

Service of the within motion is acknowledged this 22d day of August 1938.

LAMAR WILLIAMSON,  
*Attorney for Alex H. Rowell and William R. Humphrey,  
 as Receivers for Cypress Creek Drainage District.*

Service of the within motion is acknowledged this 22d day of August 1938.

LAMAR WILLIAMSON,  
*Attorney for Cypress Creek Drainage District.*

Service of the within motion is acknowledged this — day of August 1938.

THOMPSON, MITCHELL, THOMPSON & YOUNG,  
 FRED ARMSTRONG,  
*Attorney for Mercantile-Commerce Bank and Trust Company,  
 and Mercantile-Commerce National Bank.*

[Endorsed:] Filed in U. S. Circuit Court of Appeals, Aug. 23, 1938.

*Order of argument*

October Term, 1938

Monday, October 3, 1938

This cause having been called for hearing in its regular order, argument was commenced by Mr. Lamar Williamson for appellant, Mrs. Julia Caroline Sponenbarger, and the hour for adjournment having arrived further argument was postponed until tomorrow morning.

*Order of submission*

October Term, 1938

Tuesday, October 4, 1938

This cause is this day called for further hearing, and argument is continued by Mr. Lamar Williamson for appellant, Mrs. Julia Caroline Sponenbarger, by Mr. Fred Armstrong for appellant, Mercantile Commerce Bank and Trust Company, and is concluded by Mr. Fred A. Isgrig, United States Attorney, for appellee.

Thereupon, this cause is submitted to the Court on the transcript of the record from said District Court, the motion of St. Louis Union Trust Company, as owner of certain bonds, etc., and as Trustee in a mortgage and pledge instrument, etc., to dismiss the appeal allowed to it in this capacity, and on the briefs of counsel filed herein.

*Opinion*

United States Circuit Court of Appeals, Eighth Circuit

No. 11,090. November Term, A. D. 1938

MRS. JULIA CAROLINE SPONENBARGER, ET AL., APPELLANTS

vs.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the District Court of the United States for the Eastern  
District of Arkansas

[February 8, 1939]

Mr. Lamar Williamson (Mr. E. E. Hopson and Messrs. Williamson & Williamson on the brief) for Appellant Mrs. Julia Caroline Sponenbarger.

Mr. Fred Armstrong (Messrs. Thompson, Mitchell, Thompson & Young, Mr. Henry Davis and Messrs. Bryan, Williams, Cave & McPheeters on the brief) for Appellant Mercantile-Commerce Bank and Trust Company, et al.

Mr. Fred A. Isgrig, United States Attorney (Mr. John C. Dyott and Mr. John S. Gatewood, Special Assistants to the Attorney General, on the brief) for Appellee.

Before STONE, WOODBROUGH, and VAN VALKENBURGH, Circuit Judges.  
VAN VALKENBURGH, Circuit Judge, delivered the opinion of the court.

Appellant Sponenbarger owns forty acres of land in Desha County, Arkansas. August 11, 1934, she filed action in the District Court of the United States for the Eastern District of Arkansas, under the Tucker Act (28 U. S. C. A. 41 [20]) for compensation for the alleged taking of her said property, claiming that its fair market value was reduced as a result of the establishment of Boeuf Floodway, which includes the land in question, under authority of the Mississippi River Flood Control Act of May 15, 1928 (33 U. S. A. 702a-702n). The destructive flood of 1927 aroused the Congress into recognition of the fact that flood control of the Mississippi River is a national problem and a national responsibility. Accordingly, December 1, 1927, the Chief of Engineers, Major General Edgar Jadwin, submitted a report to the Secretary of War embodying a project for the flood control of the Mississippi River. This report was printed as House Document Number 90, Seventieth Congress, First Session. The project submitted was commonly called the "Jadwin Plan" in honor of its author. May 15, 1928, Congress enacted a Flood Control measure (45 Stat. 534 et seq.), based upon the report of General

Jadwin. Such parts of this Act as are deemed essential or material to the issues here under consideration are:

From Sec. 1. "That the project for the flood control of the Mississippi River in its alluvial valley and for its improvement from the Head of Passes to Cape Girardeau, Missouri, in accordance with the engineering plan set forth and recommended in the report submitted by the Chief of Engineers to the Secretary of War dated December 1, 1927, printed in House Document Numbered 90, Seventieth Congress, first session, is hereby adopted and authorized to be prosecuted under the direction of the Secretary of War and the supervision of the Chief of Engineers: Provided, That a board to consist of the Chief of Engineers, the president of the Mississippi River Commission, and a civil engineer chosen from civil life to be appointed by the President, by and with the advice and consent of the Senate, \* \* \* is hereby created; and such board is authorized and directed to consider the engineering differences between the adopted project and the plans recommended by the Mississippi River Commission in its special report dated November 28, 1927, and after such study and such further surveys as may be necessary, to recommend to the President such action as it may deem necessary to be taken in respect to such engineering differences and the decision of the President upon all recommendations or questions submitted to him by such board shall be followed in carrying out the project herein adopted. The board shall not have any power or authority in respect to such project except as hereinabove provided."

From Sec. 2. "In view of the great expenditure, estimated as approximately \$292,000,000, heretofore made by the local interests in the alluvial valley of the Mississippi River for protection against the floods of that river; in view of the extent of national concern in the control of these floods in the interests of national prosperity, the flow of interstate commerce, and the movement of the United States mails; and, in view of the gigantic scale of the project, involving flood waters of a volume and flowing from a drainage area largely outside the States most affected, and far exceeding those of any other river in the United States, no local contribution to the project herein adopted is required."

From Sec. 3. "No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place; Provided, however, That if in carrying out the purposes of this Act it shall be found that upon any stretch of the banks of the Mississippi River it is impracticable to construct levees, either because such construction is not economically justified or because such construction would unreasonably restrict the flood channel, and lands in such stretch of the river are subjected to overflow and damage which are not now overflowed or damaged by reason of the construction of levees on the opposite banks of the river it shall be the duty of the Secretary of War and the Chief of Engineers to institute proceedings on behalf of the United States Government to acquire either the absolute ownership



of the lands so subjected to overflow and damage or floodage rights over such lands."

From Sec. 4. "The United States shall provide flowage rights for additional destructive flood waters that will pass by reason of diversions from the main channel of the Mississippi River: Provided, That in all cases where the execution of the flood-control plan herein adopted results in benefits to property such benefits shall be taken into consideration by way of reducing the amount of compensation to be paid. The Secretary of War may cause proceedings to be instituted for the acquirement of condemnation of any lands, easements, or rights of way which, in the opinion of the Secretary of War and the Chief of Engineers, are needed in carrying out this project."

From Sec. 9. "The provisions of sections 13, 14, 16, and 17 of the River and Harbor Act of March 3, 1899, are hereby made applicable to all lands, waters, easements, and other property and rights acquired or constructed under the provisions of this Act."

May 27, 1929, the Secretary of War submitted to Attorney General Mitchell an inquiry "whether the project in House Document, 70th Congress, 1st Session, is the legal project to be executed in accordance with law, and whether this project is already fixed and not subject to review by this administration." The Attorney General, pointing out that only "engineering differences" were to be inquired into by the special board, created by the Act, "all other differences between the plans, if any, having been definitely resolved by Congress in favor of the plan of December 1, 1927," and that "questions such as the obligation to provide flowage rights, or to make compensation in connection therewith, do not fall within the term 'engineering differences,'" advised the Secretary of War that "the project set forth in House Document No. 90, 70th Congress, 1st Session, is the legal project to be executed in accordance with the law." (Opinions of Attorneys General, vol. 36, p. 80).

The district court, having made findings of fact submitted by the defendant United States, held generally that "it cannot be successfully contended that plaintiff's land has been appropriated by the defendant, thereby giving rise to an implied contract to compensate the owner." Accordingly, judgment was awarded defendant, appellee herein.

As stated by the trial court, the Jadwin Plan, adopted by the Flood Control Act of May 15, 1928, embodied an extensive flood control program in the Mississippi Valley from Cape Girardeau, Missouri, to the Head of the Passes in Louisiana.

"That portion of the plan of immediate concern in this case deals with the suggested treatment of the Mississippi River from the White and Arkansas Rivers on the north, to the Red River on the south, usually referred to as the 'Middle Section'."

The court in its opinion thus states succinctly the Jadwin Plan provision for the Boeuf Floodway and the essential features of the Floodway:

"The Jadwin plan made provision for a floodway starting shortly south of the mouth of the Arkansas River, at Cypress Creek, thence southwardly along the basin of the Boeuf River to the backwater area of the Red River in the State of Louisiana. The source of this floodway, as planned, extended along the levee on the west side of the Mississippi River from Rohwer to Luna Landing, a distance of thirty miles."

The essential features of the proposed floodway, as they were set forth in the plan adopted, were (1) a section of the riverside levee at Cypress Creek, designated a fuse plug, across the upper end of the floodway, of less height than the contiguous levee, or the levee on the opposite side of the river; this was to be provided by leaving intact and unaltered the then existing riverside levee, built and maintained at the 1914 grade and section, as established by the Mississippi River Commission. The grade of this fuse plug section was equivalent to 60.5 feet on the gauge at Arkansas City. When the river reached that stage, the water would run over the levee and into the floodway. (2) The grade of the riverside levees above and below the fuse plug section, as well as that on the east side of the river, was to be raised three feet, to effect the entry of excess flood water into the floodway. (3) A system of guide levees, on the east and the west side of the floodway to hold the water in the designated channel, and prevent it from spreading out on the lands on either side."

Appellants claim that a servitude was impressed upon plaintiff Sponenbarger's property equivalent to a taking thereof by the enactment of the Flood Control Act of May 15, 1928, and by

"The adoption of a program, and the assumption by the government of the control of the fuse plug section, because of which, it is claimed, the plaintiff is deprived of the right of 'self defense' against a threatened flood, and her land decreased in market value;"

also by

"The act of the government in raising the levee above, below and across the river from the Cypress Creek gap, thereby making it certain that in the event of a flood which the levee would not withstand, plaintiff's land would be covered with water."

The substantial defense interposed by the United States is thus stated by the trial court:

"The answer of defendant asserted (1) that the enactment of the Flood Control Act created no express or implied obligation to compensate plaintiff, or that any act of the Government done under authority of the said statute constituted a taking of plaintiff's property; and (2) that the Boeuf Floodway had by a subsequent Act of Congress been abandoned and the Eudora Floodway substituted in lieu thereof."

It thus becomes important to examine House Document No. 90 to ascertain the essential features of the Jadwin Plan which, as Attorney General Mitchell convincingly holds, is the fixed legal project to be executed in accordance with law. The practical limits of this opinion forbids more than quotation sufficient to disclose the essential features of this controlling plan and the grounds for their insistence.

From Section 3. "The recommended plan fundamentally differs from the present project in that it limits the amount of flood water carried in the main river to its safe capacity, and sends the surplus water through lateral floodways."

Floodways from the Arkansas River through the Tensas Basin to the Red River to relieve the main channel of the water it cannot carry and to protect the general levees is pronounced an "essential feature" of the plan.

From Section 7. "Man must not try to restrict the Mississippi River too much in extreme floods. \* \* \* The water which cannot be carried in the main channel with the levee at reasonable height must be diverted and carried laterally. \* \* \* As a general setback is not practicable the remainder must be supplied by floodways paralleling the general course of the river."

In that way the waters of a flood of great magnitude; such as that of 1927, would be passed out to the Gulf "without danger of life in the alluvial valley, and without damage to property except in the floodways allotted for its passage." (From Section 8.)

From Section 16. "From the mouth of the Arkansas to the Old River, at the mouth of the Red, extreme floods cannot be carried between levees of the Mississippi without dangerous increase in their heights. A floodway for excess floods is provided down to the Boeuf River, on the west side of the river. \* \* \* The entrance to the floodway is closed by a safety plug section of the levee, at present grade, which is located at Cypress Creek, near the mouth of the Arkansas. To insure their safety until this section opens, the levees of the Mississippi, from the Arkansas to the Red, will be raised about 3 feet. To prevent flood waters from entering the Tensas Basin, except through the floodway during high floods, the levees on the south side of the Arkansas will be strengthened and raised about 3 feet as far upstream as necessary."

From Section 17. "The section at the head of the floodway will protect the land within the floodway levees against any flood up to one of the magnitude of the 1922 flood. A flood of a magnitude somewhere between that of 1922 and of 1927 will break it, turning the excess water down the floodway, which will carry it safely to the backwater area at the mouth of the Red River."

From Section 119. "The Boeuf River bottom is selected for this diversion because it is the most suitably located to receive the water, is the most direct route, has the best width, and covers largely undeveloped swampland."

From Section 120. "The United States must have control over the Cypress Creek levee and keep it substantially at its present strength and present height."

From Section 121. "The remainder of the alluvial valley, on each side of this stretch of the river, barring accident, will have complete protection from all possible floods."

The average height that other levees are to be raised is approximately three and one-half feet. The Cypress Creek levee is to remain at the 1914, or present, level. Levees generally were to be constructed where necessary to prevent the floodwater of any one of the great basins from flowing into the basin below it "except through the relief or fuse plug levees intended to carry off the excess waters during high floods."

From Section 140. "Since the protection and preservation of the flood-discharge capacity of the alluvial valley of the Mississippi River is requisite to the common welfare of the Nation and to the preservation of the many lines of interstate commerce which cross the valley, it should be protected and preserved by similar legislation. The warning cannot be too strongly emphasized that unless the flood-discharge capacity provided in the plan herein recommended is preserved, a future great flood will result in a disaster as great as or greater than that experienced this year."

The importance of the Mississippi River and the damage of its floods to the general welfare is thus stated in various sections of the Jadwin Plan:

"The Mississippi River is the world's greatest river, combines size with usefulness, and is one of the grandest and most valuable assets of the United States."

"Through its aid to drainage, navigation, water supply power, manufacturing, agriculture, and other incidental uses, it renders vital service to over 40 percent of the area of the country. Its waters come from 31 States, and were it not for the levees, would in flood cover 30,000 square miles, a territory greater than many of our States."

"Its alluvial valley has a growing population and contains the largest area of the richest land in the United States."

"Its worst characteristic is that its floods inflict at times great damage upon the people and property in the alluvial valley of the lower river. They take their toll in life and in damage to property, affecting the inhabitants of the valley and investors, manufacturers, and consumers throughout the country. They interfere with the food supply and the general welfare of the country, with its postal service, and transcontinental and other interstate commerce."

From the foregoing it will be seen that the essential feature of the Jadwin project, as distinguished from previous plans and practices, is the diversion of flood waters from the main river channel, and their discharge through established floodways of which the Boeuf Floodway is one. By this means it is expected that at least 20,550 square miles of the 30,000 square miles of the alluvial valley will be protected



annually, "without damage to property except in the floodways." "The levees generally will be raised about three feet, so that the selected weaker relief levees will be at about the elevation of the present (1914) levee top, and will surely serve their purpose." The control of the Mississippi River by levees alone is found to be impracticable. It appears beyond question that the Boeuf Floodway is a planned floodway; that the Congress has created and established such floodways in the exercise of its power over transcontinental and other interstate commerce, and its conceded right to protect the general public in matters so closely related to the general welfare.

The plan, adopted by the Congress as a fixed project in all its essential features, provides that the United States must have control of the Cypress Creek levee and keep at its (then) present strength and height. Without question in the passage of this Act, Congress has assumed control of this fuse plug, and, by entering a field within its jurisdiction, has excluded all local interference with its national powers. The contention of counsel for appellants is that the restriction of this fuse plug levee to its 1914 strength and height, while other levees, especially above and below on the west side of the river, and those on the east side of the river are raised in height, throws an additional burden upon the Cypress Creek levee protecting lands lying in the Boeuf River bottom. The plan is to direct excessive flood waters into this floodway, thereby lowering the safety and protection of these lands as compared with others situated in this same section of the alluvial valley. In fact the frankly stated object of the Jadwin plan is to protect more than two-thirds of the valley at the expense of potential damage to property in the floodways in the event of excessive floods. Such discrimination is wanting in the absence of government control of levees, and in the existence of local responsibility for levee or other flood protection.

It will be recalled that Section 3 of the Act provides that "no liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place"; but Section 4 directs that the United States shall provide flowage rights for additional destructive flood waters that will pass by reason of diversions from the main channel of the river, and the Secretary of War may cause proceedings to be instituted for the acquirement by condemnation of lands, easements, or rights of way. These two sections are entirely consistent. Appellant Sponenbarger claims that a servitude has been placed upon her land by the creation of this essential floodway in which the land is situated. That the diversion from the main channel of the river is now a fixed fact in case of excessive floods, instead of a casual and incidental happening in case of local responsibility, now placed beyond her control by virtue of the Act of May 15, 1928.

It is true that the Boeuf River Basin has been flooded occasionally in past years. So, likewise, have other lands in this section of the alluvial valley now sought to be comparatively, if not absolutely,

that the lands in the Boeuf Floodway must necessarily be flooded by diversion of waters from the main channel in case of the excessive floods feared and in contemplation by this Flood Control Act. The United States has not caused proceedings to be instituted for the requirement of such flowage rights or easements, and appellant claims that the market value of her land has been greatly impaired by the flood and servitude thus cast upon it, and that this constitutes a taking within the meaning of the Tucker Act. Of course, it is not contended that the land is actually physically appropriated, and all citations purporting to deal with such a situation are largely, if not entirely, beside the point.

"The fact that condemnation proceedings were not instituted, and that the right was asserted in suits by the owners did not change the essential nature of the claim. The form of remedy did not qualify the right. It rested upon the Fifth Amendment. Statutory recognition was not necessary. A promise to pay was not necessary." *Jacobs v. United States*, 290 U. S. 13, 16.

The appropriation of private property for a public use requires the return of a full and exact equivalent to the owner. That equivalent in case of complete appropriation is the market value of the property at the time of the taking, contemporaneously paid in money. In case an easement only is impressed and taken, the rule is to determine the fair market value before the easement is imposed, next to find that value after the taking, and the difference is the amount of liability. *Olson v. United States*, 292 U. S. 246.

In *Hurley v. Kincaid*, 285 U. S. 95, an owner of land within the proposed channel of the Boeuf Floodway, part of the plan now under consideration, brought suit to enjoin the carrying out of the work in the floodway without proceedings first having been instituted to condemn his land or the flowage rights thereon. The District Court of the Western District of Louisiana, held that a right of action was alleged, and granted the injunction prayed. (35 F. [2d] 335, and 37 F. [2d] 602.) The latter decree was affirmed by the Court of Appeals for the Fifth Circuit. *United States v. Kincaid*, 9 F. (2d) 768. The supreme Court, in reversing the case, had no occasion to determine, nor did it determine, any of the controverted issues of fact or propositions of substantial law, but said:

"We may assume that, as charged, the mere adoption by Congress of a plan of flood control which involves an intentional, additional, occasional flooding of complainant's land constitutes a taking of it—as soon as the Government begins to carry out the project authorized. (Citing, among other cases, *United States v. Lynah*, 188 U. S. 445, 469; *United States v. Cress*, 243 U. S. 316, 328; and *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U. S. 327, 329.) If that which has been done, or is contemplated does constitute such a taking, the complainant can recover just compensation under the Tucker Act in an action at law as upon an implied contract." *Hurley v. Kincaid*, 285 U. S. 1. c. 103, 104.

In *United States v. Lynah*, supra, it is said:

"It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law \* \* \* it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to a total destruction without making any compensation, because in the narrowest sense of that word it is not taken for the public use" (l. c. 469).

In *United States v. Cress*, supra (l. c. 328), it is said:

"There is no difference of kind, but only of degree, between a permanent condition of continual overflow by backwater and a permanent liability to intermittent but inevitably recurring overflows."

And in *Portsmouth Harbor Land & Hotel Company v. United States*, cited above, it is held that "where acts amount to a taking of property by the United States, without assertion of an adverse right, a contract to pay may be implied whether it was thought of or not." But in this case, as we have seen, the purpose to pay was not only thought of, but expressly contemplated. In *Sanguinetti v. United States*, 264 U. S. 146, liability of the United States *ex contractu* was denied where "it did not appear either that the flooding was intended or anticipated by the Government or its officers, or that it was attributable directly, in whole or in part, to the Improvement, rather than to natural conditions." Such holdings are to be found in cases involving improvements to navigation, subject to the absolute power of Congress, where the flooding resulting is in its nature indirect and consequential instead of the direct objective of the Congressional Act. *Bedford v. United States*, 192 U. S. 217; *United States v. Chandler-Dunbar Co.*, 229 U. S. 53.

In the instant case the government has not merely begun to carry out the project authorized by the Act of May 15, 1928. The essential features of the Boeuf Floodway as contemplated by the Act and by House Document No. 90 have been established for several years. The Floodway stands ready to carry off the excess waters of major floods in accordance with the provisions of that legislation. Obviously the omission of immaterial details could not affect efficient operation of this essential feature of the flood-control plan. The testimony is that at the time this suit was filed in 1934 this plan was at least 80 percent complete. The United States began actual construction of this project under the Flood Control Act in January 1929. The so-called incomplete feature of the plan represents the failure to build the guide levees intended to limit the width of the floodways in the Boeuf and Atchafalaya Basins. Accordingly expert engineering witnesses testify that the Boeuf Floodway was 90 percent complete when this suit was tried in the district court. The trial court was of opinion that the fact that sections of the levee, both at the lower and upper ends of the fuse plug proper, were also left temporarily at the 1914 grade gives to plaintiff's land the same levee protection "as all other

alluvial lands in that section." To this we cannot agree. Section 702a provides that "pending completion of any floodway, or diversion channel, the areas within the same shall be given the same degree of protection as is afforded by levees *on the west side* of the river contiguous to the levee at the head of said floodway (the fuse plug proper), but nothing shall prevent, postpone, delay, or in anywise interfere with the execution of that part of the project *on the east side* of the river, including raising, strengthening, and enlarging the levees *on the east side* of the river." [Italics supplied.] This comprehensive plan binds together the lands on both sides of the river as parts of the same section of the alluvial valley. The temporary retention of the 1914 grade for a small space on each side of the fuse plug proper, but serves temporarily to enlarge that fuse plug. This entire section would go with any excessive flood that required diversion from the main channel as planned; and the plan provides that this fuse plug shall be "blown," or crevassed, if that is found necessary to facilitate and hasten diversion.

The guide levees within the Boeuf basin were not necessary to this essential feature of the project. They would serve merely to limit the quantity of the lands subject to diversion overflow. But the Sponenbarger land is menaced in either case. The presence of these guide levees would in no sense lessen the probability or possibility of a destructive crevasse at the Cypress Creek levee.

It is next urged that the Boeuf Floodway has, by a subsequent Act of Congress, been abandoned, and the Eudora Floodway substituted in lieu thereof. The Act of June 15, 1936, did provide for a modification of the 1928 Act, and the construction of what was described as the Eudora Floodway. As stated by the trial court, "its general course is much the same as the Boeuf Basin, but it clings closer to the west bank of the Mississippi." It contains little more than one-half the total acreage of the Boeuf Basin, but in it equally lies the Sponenbarger land. The Act of 1936 (33 U. S. C. A. 702a-2) provides that the Boeuf Floodway shall be abandoned as soon as the Eudora Floodway is in operative condition. Not only is the Eudora Floodway not in operative condition, but its ultimate construction is now regarded as extremely doubtful, owing to apparently irreconcilable disagreements between the government and local authorities over the terms of acquiring flowage easements.

At any rate the Boeuf Floodway is, and is recognized to be, in operative existence, and stands ready to discharge its functions planned in case of excessive flood. It is true that the Boeuf Basin has, like other parts of this alluvial section, been subject to occasional overflow. At times, like such other parts, it has escaped. By the provisions of this plan of flood control it is subjected to a planned and practically certain overflow in case of the major floods contemplated and described. No one can foretell when such may occur, but that is the only remaining uncertainty in the premises. If, and when, such floods do occur, serious destruction must be conceded. So considered, a reasonable construction of Section 4 of the Act of May 15, 1928,



must regard such as the "additional destructive flood waters that will pass by reason of diversions from the main channel of the Mississippi River," for which the United States shall provide flowage rights. (Section 4, Act May 15, 1928.) The fuse plug levee is the "spillway" of which the Act speaks, and the "floodway" is the path of the flood within the Boeuf Basin.

It is true that the mere raising of levees on one side of a river is not, in effect, the taking of land on the other side. *Jackson v. United States*, 230 U. S. 1. That case involved works constructed for the benefit of navigation, and the damages involved were therefore held to be remote and consequential. The United States had adopted no comprehensive plan for flood control; consequently it was held not to be responsible for damages resulting from overflow, or for failure to construct additional levees along the Mississippi River valley to afford protection from increased overflow caused by levees constructed at other points by state and federal authority.

The Mercantile-Commerce Bank and Trust Company, Mercantile-Commerce National Bank, and St. Louis Union Trust Company, appellants, were joined as additional parties plaintiff on motion of defendant. They appear as lien claimants who are trustees for the local Arkansas Levee District, and for the bondholders thereof under bond pledge agreements. They favor the recovery of compensation, but insist that, as such trustees, they should participate in any action which seeks to fix the total amount thereof, or which seeks to determine the interest of any particular party therein. The truly critical issue, as stated in their briefs, very well summarizes what has already been said:

"The Government has deprived the Boeuf Basin landowners of property, to-wit: Of certain of the attributes of their property rights in the land in the Boeuf Basin, by designing and constructing a levee system deliberately intended to sacrifice the Boeuf Basin lands for the benefit of a much larger group and for the public good and, among other things, has deprived the Boeuf River landowners of that particular attribute of their property which consisted of their common-law right to protect their lands against floods by raising and strengthening their protective levees and by giving the Government the right to sacrifice even the existing levees when necessary to accomplish the general purpose. The lien claimants are not contesting the wisdom of the plan nor the right of the government to adopt it, but are only insisting that the few who are sacrificed for the benefit of the many be compensated either by the many or at public expense."

The trial court, having found against appellant Sponenbarger said: "In view of this conclusion it is not conceived to be necessary to make any findings as to the interveners."

We have given very careful consideration to this record and to the able and painstaking analysis of the learned trial judge in findings and opinion. We find ourselves unable to concur in the conclusion that no recovery against the government can result from the easement appropriated and the servitude that has been impressed

upon the land of appellant Spohnbarger. The fact that the ascertainment of just and adequate compensation will not be a simple matter in view of the complexity of the elements that are said to enter into and condition the computation cannot be permitted to interfere with the constitutional rights of the parties.

Our conclusion is that the judgment must be reversed, and the cause remanded to the district court for further proceedings not inconsistent with the views herein expressed.

WOODBROUGH, Circuit Judge, dissenting.

I dissent because it has appeared to me that the judgment of the trial court ought to be affirmed on the grounds set forth in its opinion.

### *Judgment*

United States Circuit Court of Appeals, Eighth Circuit

November Term, 1938

Thursday, February 9, 1939

No. 11090

MRS. JULIA CAROLINE SPONENBARGER; GRADY MILLER, AS RECEIVER FOR THE SOUTHEAST ARKANSAS LEVEE DISTRICT; ALEX H. ROWELL AND WILLIAM R. HUMPHREY, AS RECEIVERS FOR THE CYPRESS CREEK DRAINAGE DISTRICT; CYPRESS CREEK DRAINAGE DISTRICT; MERCANTILE-COMMERCE BANK AND TRUST COMPANY AND MERCANTILE-COMMERCE NATIONAL BANK IN ST. LOUIS; AND ST. LOUIS UNION TRUST COMPANY, APPELLANTS

vs.

UNITED STATES OF AMERICA

Appeal from the District Court of the United States for the Eastern District of Arkansas

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Arkansas, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, in this cause, be, and the same is hereby, reversed without costs to either party in this Court.

And it is further ordered by this Court that this cause be, and the same is hereby, remanded to the said District Court for further proceedings not inconsistent with the views expressed in the opinion of this Court filed herein February 8, 1939.

FEBRUARY 9, 1939.

*Petition for rehearing*

In the United States Circuit Court of Appeals, Eighth Circuit

No. 11090—At Law

MRS. JULIA CAROLINE SPONENBARGER ET AL., APPELLANTS

UNITED STATES OF AMERICA, APPELLEE

The United States of America, the appellee in the above-styled case, files this its petition for a rehearing, and for grounds therefor alleged:

## I

In holding that the defendant Government by the Flood Control Act of May 15, 1928 (33 U. S. C. A. 702a-702n) had taken from the appellant and owners of lands similar situated, the right of self-protection by taking absolute and exclusive control of the fuse-plug section of the levee for the purpose of maintaining it at its 1914 grade and section, and for the ultimate purpose of flooding the lands in the Boeuf Basin, including appellant's land, the court overlooked (1) Committee Document No. 2, 71st Congress (R. 252), a letter from the then Secretary of War stating that there was no law preventing the landowners in the Boeuf Basin from raising the fuse-plug, and that the states should be called on to enact such legislation as would maintain the levee at its 1914 height and grade, and that would make provision for compensating the landowners for the deprivation of the right of self-protection; that because the states were benefited by the Flood Control Act and work to be done thereunder, it was their duty to thus legislate and provide for compensation for their own citizens; (2) and the testimony of Col. Oliver, District Engineer located at Vicksburg, that it had always been the understanding of the War Department that they had no control over the fuse-plug levee, and that the landowners were at liberty to raise it to any height they desired (R. 252); and the court overlooked the fact that no provision is found in the Flood Control Act May 15, 1928, for the taking and maintaining control over the fuse-plug by the United States government; and before an act may be construed as an expression of an intent to take private property, that intent must be positively and definitely expressed, and such intent will not be inferred in the absence of an overt act constituting a taking.

## II

In holding that the appellee government, by enactment of the Flood Control Act May 15, 1928, by its Congress, had taken an easement of flowage rights over the land of the appellant, the court overlooked the fact, shown by undisputed evidence, that her land had always been in a floodway and frequently flooded to a depth of from ten to

twenty feet; and the court overlooked the fact that there is no evidence in the record that any additional destructive floodwaters will result from maintaining the fuse plug at its 1914 height and grade.

### III

In holding that the appellee government, by the enactment of the Flood Control Act of 1928 by its Congress, had taken an easement of flowage rights over the lands of the appellant and other lands similarly situated, and that it was the purpose and intention of the Government, by virtue of said Act to subject appellant's lands and other lands similarly situated, to additional floodwaters, the court overlooked the undisputed fact that the appellee government has expended many millions of dollars in corrective dredging and in shortening the channel of the Mississippi River 100 miles between Arkansas City and the mouth of the Red River in Louisiana, and that by reason of this engineering work, it was shown, and undisputed, that a flood, even of the magnitude of the 1927 flood, would have safely passed the fuse-plug, and would do so now, and that the flood of 1927 was an unprecedented flood, and that these undisputed facts show conclusively that instead of taking appellant's land as a floodway, she now enjoys a greater degree of protection than her land had before the enactment of the Flood Control Act of 1928.

### IV

In holding that the appellee government, by enactment of the Flood Control Act of 1928 by its Congress, had taken an easement of flowage right over the land of the appellant and over other lands similarly situated, the court overlooked the fact that, the government, not having lowered or otherwise impaired the fuse-plug levee, if, by reason of some superflood in the future, the flood waters of the Mississippi River should overtop the levee, the same result would have followed had the Flood Control Act not been passed by the national Congress.

### V

In holding that the appellee government, by enactment of the Flood Control Act of 1928 by its Congress, under which the levees on the east bank of the Mississippi River had been raised at some points, and the levees on the west bank of the river, south of Arkansas City had also been raised three feet, and that by reason of such work by the Government, appellant's land had been subjected to increased danger, and the protection afforded by the fuse-plug levee had been mitigated, the court overlooked the undisputed fact that, by reason of additional work done by the Government engineers, appellant enjoys now a greater degree of security from floods than ever before, and that for a period of ten years, since the passage of said Act the lands in the Boeuf Basin have been free of flood waters, whereas, prior thereto, they had been subjected to frequently recurring and destructive floods.



## VI

The court holds that by the Flood Control Act of 1928 Congress enacted into law the recommendation of the chief of engineers of the War Department, General Jadwin, known as the Jadwin Plan. The court overlooked the fact that, according to the letter of recommendation of General Jadwin to the War Department, the General emphatically called attention to the fact that floods could not be controlled by levees south of the Arkansas River, and that according to the opinion of General Jadwin, expressed in his report known as the Jadwin Plan, it would have been hazardous to raise the fuse plug, saying thereby that to do so would have imperiled the appellant's land and placed it in a position of greater danger from floods than existed by leaving the fuse-plug at its 1914 grade and height.

## VII

In holding that appellee Government by the Flood Control Act of 1928 had subjected appellant's land to an additional servitude in the nature of a floodway and was therefore liable to the appellant for the value of such flowage rights, the court overlooked the fact and the law that appellant's land being in a flood area of a navigable stream, though privately owned, was already subject to the servitude of the Government in respect to any work authorized by Congress under its constitutional powers. (Vide, cases cited in appellee's brief under this head.)

The appellee, therefore, prays that a rehearing of this cause be granted, and that the judgment of the District Court for the Eastern District, Western Division of Arkansas, be affirmed.

Respectfully submitted.

UNITED STATES OF AMERICA,  
FRED A. ISGRIG,  
*United States District Attorney,*  
JOHN S. GATEWOOD,

*Special Assistant to the Attorney General,  
For Petitioner.*

I, Fred A. Isgrig, hereby certify that I am United States District Attorney for the Eastern District of Arkansas, and that I am one of the attorneys for the United States of America, the appellee herein, and that, in my opinion, as such counsel, the grounds of the foregoing petition for rehearing in said cause are well founded in law, and is filed in good faith and he believes same to be meritorious, and that the same is proper to be presented and filed.

FRED A. ISGRIG,  
*Attorney for United States of America.*

[Endorsed:] Filed in U. S. Circuit Court of Appeals, Feb. 20, 1935.

*Order denying petition for rehearing*

November Term, 1938

Tuesday, February 27, 1939

The petition for rehearing filed by counsel for appellee in this cause having been considered, It is now here ordered by this Court that the same be, and it is hereby, denied.

FEBRUARY 27, 1939.

*Motion for stay of issuance of mandate*

Comes now the appellee above named, United States of America, and respectively moves this Honorable Court to stay the mandate in the above entitled cause and not to permit the same to be issued out of said cause until the further orders of the Court, pursuant to the Rules of the Court, on the ground and for the reason that appellee expects and intends, in good faith, within the time allowed by law, to apply to the Supreme Court of the United States of America by petition for a review on writ of certiorari the decision and judgment herein rendered in favor of the appellant and against the appellee:

Wherefore, appellee prays that this Court make and enter an appropriate order herein staying the issuance of the mandate in the above entitled action for a period of thirty (30) days or until further orders of this Court.

UNITED STATES OF AMERICA,  
By FRED A. ISGRIG,

*United States District Attorney  
for the Eastern District of Arkansas.*

STATE OF ARKANSAS,  
*County of Pulaski.*

Fred A. Isgrig, upon oath, states:

That he is United States District Attorney for the Eastern District of Arkansas and that he is one of the attorneys for the Appellee and Petitioner, United States of America; that he has served a copy of the above and foregoing motion on Appellant, Mrs. Julia Caroline Sponenbarger at Arkansas City, Arkansas, and to her counsel, Hon. Lamar Williamson, Monticello, Arkansas, and to E. E. Hopson, McGehee, Arkansas; said copies being mailed by regular United States mail and with postage fully paid and that same were deposited in the Post Office at Little Rock, Arkansas, on the 4th day of March 1939.

FRED A. ISGRIG.

Subscribed and sworn to before me this 4th day of March 1939.

GRADY MILLER, *Clerk.*

By T. D. GOLDSBY, *D. C.*

[Enforced:] Filed in U. S. Circuit Court of Appeals, Mar. 6, 1939.

*Order staying issuance of mandate*

November Term, 1938

Tuesday, March 7, 1939

On Consideration of the motion of appellee for a stay of the mandate in this cause pending a petition to the Supreme Court of the United States for a writ of certiorari, It is now here ordered by this Court that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

MARCH 7, 1939.

*Motion of appellee for further stay of mandate*

[Western Union Telegram]

LITTLE ROCK, ARK.,

6 115P, 1939, Apr. 6, PM 1 26.

Honorable E. E. KOCH,

*Clerk, U. S. Circuit Court of Appeals, St. L.*

Advised by Department of Justice that question of certiorari in Sponenbarger case under consideration by Solicitor General; That I will be advised promptly of his decision. I am instructed to secure, if possible, further stay of mandate. The question one of such great importance it should be determined by highest Court before any further action is taken in case. Please secure, if possible, further stay of mandate.

FRED A. ISGRIG,

*U. S. Attorney.*

[Endorsed:] Filed in U. S. Circuit Court of Appeals, Apr. 6, 1939.

*Order further staying issuance of mandate*

March Term, 1939

Saturday, April 8, 1939

On Consideration of the motion of Appellee for a further stay of the mandate in this cause pending a petition to the Supreme Court of the United States for a writ of certiorari. It is now here ordered by this Court that the issuance of the mandate herein be, and the same is hereby, further stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with

the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari, record, and brief have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

APRIL 8, 1939.

United States Circuit Court of Appeals, Eighth Circuit.

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the Eastern District of Arkansas as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true, and complete copies of the pleadings, record entries, and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles, and endorsements omitted in pursuance of the rules of the Supreme Court of the United States in a certain cause in said Circuit Court of Appeals wherein Mrs. Julia Caroline Sponenbarger et al. were Appellants and the United States of America was Appellee, No. 11090, as full, true, and complete as the originals of the same remain on file and of record in my office.

In Testimony Whereof I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this fifteenth day of April, A. D. 1939.

[SEAL]

E. E. KOCH,  
*Clerk of the United States Circuit Court  
of Appeals for the Eighth Circuit.*





## Supreme Court of the United States

*Order allowing certiorari*

Filed June 5, 1939

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted, and the case is assigned for argument immediately following No. 845, Frank-  
n, et al. vs. United States of America.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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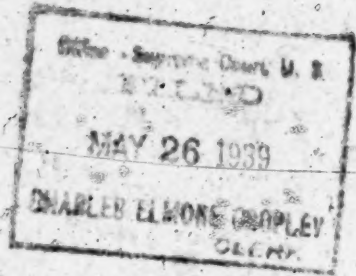
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No. — **883**

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**In the Supreme Court of the United States**

OCTOBER TERM, 1938

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UNITED STATES OF AMERICA, PETITIONER

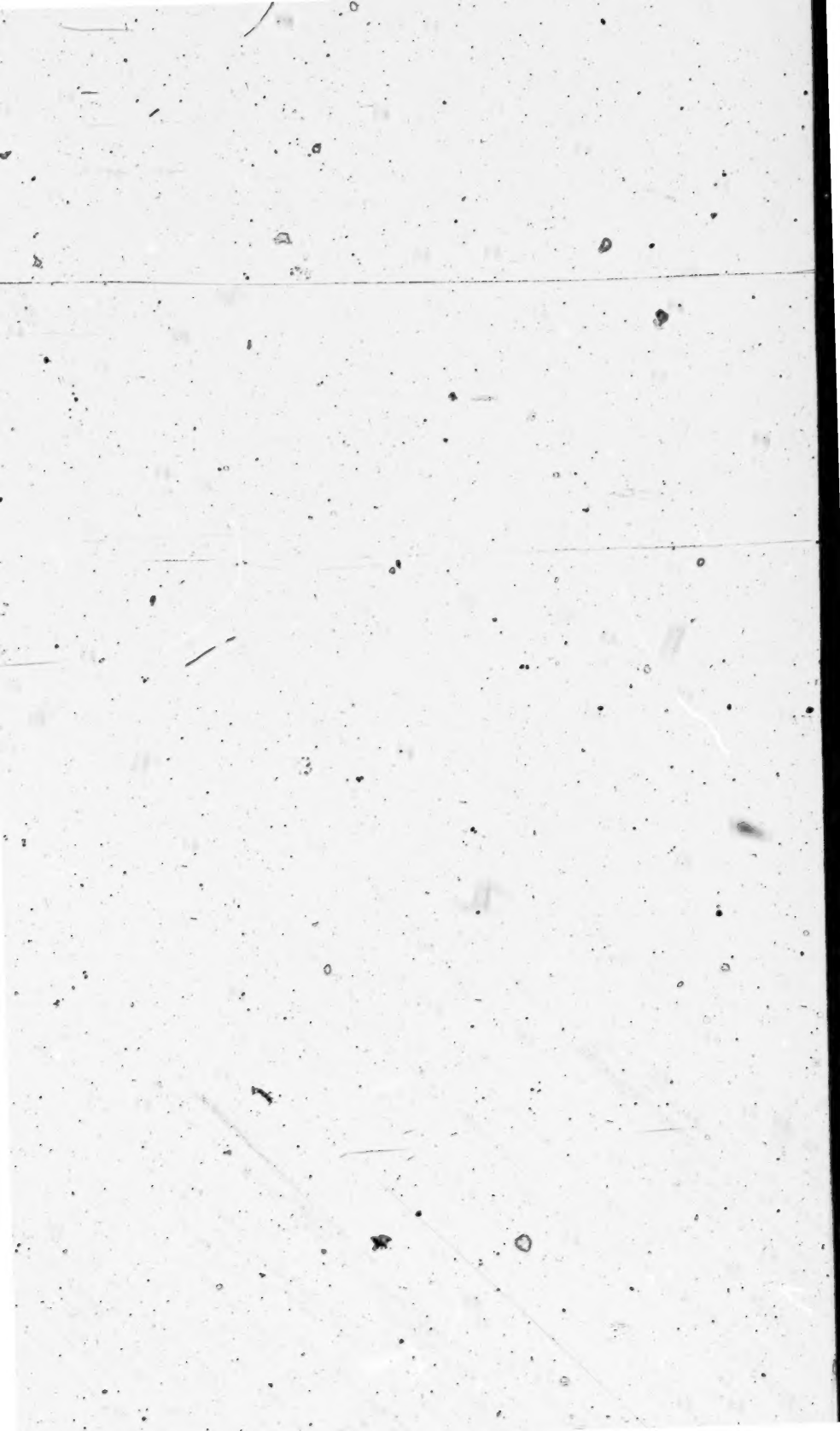
v.

MRS. JULIA CAROLINE SPONENBARGER ET AL.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH  
CIRCUIT

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# **In the Supreme Court of the United States**

**OCTOBER TERM, 1938**

**No. —**

**UNITED STATES OF AMERICA, PETITIONER**

**v.**

**MRS. JULIA CAROLINE SPONENBARGER ET AL.**

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT**

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to the United States Circuit Court of Appeals for the Eighth Circuit to review the judgment of that court entered in the above case on February 9, 1939, which reversed a judgment of the United States District Court for the Eastern District of Arkansas.

## **OPINIONS BELOW**

The opinion of the District Court (R. 376-390) is reported in 21 F. Supp. 28, and its opinion on motion for a new trial (R. 92-94) is reported in 21 F. Supp. 895. The opinion of the United States

Circuit Court of Appeals for the Eighth Circuit (R. 410-421) is reported in 101 F. (2d) 506.

#### **JURISDICTION**

The judgment of the United States Circuit Court of Appeals for the Eighth Circuit was entered on February 9, 1939 (R. 421). A petition for rehearing was denied on February 27, 1939 (R. 425). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

#### **QUESTION PRESENTED**

Whether, under the circumstances of the present case the United States has "taken" respondent's property within the meaning of the Fifth Amendment, and has thereby become liable to pay just compensation.

#### **STATUTES INVOLVED**

The relevant portions of the statutes involved are set out in the Appendix, *infra*, pp. 24-31.

#### **STATEMENT**

This suit, which was brought under Section 24 (20) of the Judicial Code, was begun by the filing of a petition on August 11, 1934, by respondent Julia C. Sponenbarger (R. 4-16). In general, the petition alleged that by the Flood Control Act of 1928 and certain acts of the United States in connection therewith, respondent's land had been damaged, and that the usefulness, enjoyment, and value

of her property had been destroyed. Compensation was sought for the taking (R. 5, 15-16). A demurrer to the petition (R. 17) having been overruled (R. 18), the United States answered (R. 77-80). Certain intervenors were made parties upon the motion of the United States (R. 25), and thereafter entered appearances (R. 28, 30, 32, 52, 66).<sup>1</sup>

The District Court, after a full trial, made extensive findings of fact and conclusions of law (R. 389, 350-366, 368-375), and filed an opinion (R. 376-390). These findings may be summarized as follows:

*Location and character of respondent's property.*—Respondent is the owner of certain land in Desha County, Arkansas, situated about two miles west of Arkansas City on the Mississippi River (R. 357). The land lies in the basin of the Boeuf River, which rises in the northern part of Desha County and flows south to the Ouachita River in Louisiana, forming a natural floodway for Mississippi water from the Mississippi River on the east, and the Arkansas and Flat rivers to the north (*id.*). Respondent's land has been repeatedly overflowed by deep high water, and has never been entirely free from overflow notwithstanding the construction of strong levees (*id.*). The land was

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<sup>1</sup> This petition does not discuss those other respondents—lienors or claimants of the property—for the reason that their rights depend entirely upon the rights of respondent Spokenbarger. The District Court, accordingly, made no finding with respect to them (R. 389).

flooded in 1912, 1913, 1919, 1921, and 1922, and in 1927 the buildings and improvements on the land were destroyed by the flood of that year, which inundated the land to a depth of 15 or 20 feet (R. 357-358; 362).

*The Jadwin flood-control plan.*—Following the disastrous and unprecedented flood of 1927 the Chief of Engineers of the Army, Major General Edgar Jadwin, recommended to the Secretary of War a plan for flood control on the Mississippi River and its tributaries (R. 358). This plan, known as the Jadwin plan, was transmitted by the Secretary of War to the President, and by him to Congress (H. Doc. No. 90, 70th Cong., 1st Sess.) (R. 353).<sup>2</sup>

The Jadwin plan was a comprehensive one, dealing with the whole alluvial valley, and designed to protect it against the greatest predictable flood (R. 353, 354-355). Several devices were combined to that end. Levees were to be strengthened and raised slightly (R. 354). Safety valves were proposed in the form of floodways of two kinds, one headed by controlled spillways through which water could be diverted from the main channel of the river and the other headed by levees of lower grade (designated as fuseplug levees) over which water would escape into the floodways whenever it should overtop them (R. 354). One of the fuseplug levees contemplated the lowering of the existing

<sup>2</sup> For the convenience of the Court, nine copies of this document have been filed with the Clerk.



levees; in the others they were to remain unchanged (*id.*). Channel stabilization and navigation improvement were a part of the general project (R. 354, 355).

The plan contemplated the creation of a floodway down the Boeuf River Basin, where respondent's land is located (R. 355). The Boeuf River bottom was selected for this diversion because it was the most suitably located to receive the water, was the most direct route, had the best width, and was largely undeveloped swampland (R. 356). The entrance to the floodway was to be headed by a fuseplug levee at the then existing grade, corresponding to 60.5 feet on the Arkansas City gauge (R. 356, 357). The contiguous levees on the Mississippi and Arkansas rivers were to be raised about 3 feet (R. 356). In order to limit the land in the Boeuf Basin that would be overflowed by excess floods, so-called guide levees were to be constructed, where natural ridges would not serve, on each side of the Boeuf River bottom, from the proposed fuseplug levee to the lower Tensas Basin (*id.*). The west guide levee was to begin just below Rohwer and the east guide levee at Luna Landing, with the fuseplug levee, about 33 miles long, in between these two points (R. 356-357. See Plaintiff's Exh. 24, R. 396). Since the purpose of the fuseplug was to provide an escape for excess water down the leveed floodway only when the flood volume should exceed the safe capacity of the main channel of the river (R. 354), the floodway would

operate only when the water reached a height above 60.5 feet on the Arkansas City gauge (R. 356). That height had been reached only once, in 1927 (*id.*). The lands in the floodways retained the same measure of protection they had theretofore enjoyed, and the intent was to protect them against any recorded flood that had occurred, except that of 1927 and, possibly, those of 1912 and 1882 (R. 355).

*Action taken pursuant to the Plan.*—The Jadwin Plan was only tentative and general in character—a mere outline of flood control in the alluvial valley of the Mississippi River (R. 360). General Jadwin himself recognized that details of the design and location of the engineering works had to be worked out and recommended that the task be entrusted to the Chief of Engineers (*id.*). Actually, Congress, in the Flood Control Act of 1928 (Act of May 15, 1928, c. 569, 45 Stat. 534; U. S. C., Title 33, Sec. 702a) adopted the general engineering plan but did not adopt all of the features of the Plan, especially in view of the engineering differences between it and a plan submitted by the Mississippi River Commission (R. 352, 359). Section 1 of the Act provides, in part:

That the project for the flood control of the Mississippi River in its alluvial valley and for its improvement from the Head of Passes to Cape Girardeau, Missouri, in accordance with the engineering plan set forth and recommended in \* \* \* House Document Numbered 90 \* \* \* is hereby

adopted and authorized to be prosecuted under the direction of the Secretary of War and the supervision of the Chief of Engineers: \* \* \*

Section 1 also provides for the creation of a Board (the Mississippi River Flood Control Board) to consider the differences in detail between the Jadwin Plan and the report of the Mississippi River Commission, and to make recommendations to the President, whose decisions should be final. The Board reported on August 8, 1928 (Comm. Doc. No. 28, H. Comm. on Flood Control, 70th Cong., 2d Sess.) and on January 10, 1929, President Coolidge approved the construction of the guide levees in the Boeuf Floodway and the acquisition of rights-of-way for those levees (R. 379).

Thereafter, pursuant to the general authority of the Mississippi River Commission, independent of the 1928 Act, the levees on the south side of the Arkansas River were raised, giving the Boeuf Basin additional protection (R. 362). Moreover, by means of cut-offs and dredging, the Mississippi River has been shortened by 100 miles between Arkansas City and the Old River (R. 360). As a result, the height of the river has been lowered 5 or 6 feet. In the flood of 1937 there was a 20 percent greater flow past Arkansas City than in 1929, with a five-foot lower stage (R. 360-361). The greatest improvement has been in the vicinity of the Boeuf River fuseplug (R. 360), and has afforded additional protection to the land of respondent (R. 362).

The Boeuf River floodway, which was a separate and independent project provided for by the 1928 Act (R. 358), was never begun (*id.*), due to "local opposition" (R. 380). See *Hurley v. Kincaid*, 285 U. S. 95. The guide levees were never definitely located as an engineering fact (R. 356), and nothing has been done toward their construction (R. 359). The levee has been left at the 1914 grade for a distance of 60 miles, from Yancopin to Vauchuse (R. 379), whereas the contemplated fuse-plug levee was to have been only about 33 miles in length (R. 357). By the Act of June 15, 1936 (c. 548, 49 Stat. 1509; U. S. C. Supp., Title 33, Sec. 702a-2), Congress abandoned that part of the 1928 Act which affected the Boeuf Floodway, and in lieu thereof has created the Eudora Floodway (R. 359). The Boeuf Floodway is no longer considered a part of the plan for flood control (R. 361).

*Effect of the Plan on respondent's land.*—All improvements located on land immediately behind levees along the main stem of the Mississippi River, including those of respondent, are at all times of the flood stage of the river subject to extreme hazards (R. 363). They have no assurance against destruction by the breaking of the levees and the natural crevassing due to the flood water, irrespective of the height and strength of the levee (*id.*). Moreover, it is impossible to predict accurately what stages a flood may reach (*id.*). Respondent's land has been overflowed repeatedly by deep high water and has never been entirely free from over-



flow, despite the construction of strong levees (R. 357). The Boeuf Basin has always been a natural floodway; all the property lies in the natural high-water bed of the river and was always subject to the servitude of flooding (R. 354, 356, 357).

Nevertheless, the construction of cut-offs and channel stabilization and the reconstruction of the levees on the south bank of the Arkansas River have resulted in a greater protection and security to respondent's land than it has ever before had (R. 362, 366). The work done in other localities pursuant to the 1928 Act has in no way changed or reduced the levee protection to respondent's property or increased the flood hazard thereto (R. 366). Whereas respondent's land were repeatedly subject to overflow prior to the passage of the 1928 Act, they have at no time since been inundated by additional destructive flood waters that passed by reason of diversion from the Mississippi, nor by any act or project carried out by the United States since the passage of the Act despite the fact that three great floods, those of 1929, 1935, and 1937, have since occurred (R. 365).

Respondent's use, possession, and control of her land have not been interfered with or molested by the United States (R. 364). Neither it nor its officers have diverted any flood waters into the floodway (R. 365). No additional servitude has been placed upon respondent's land (*id.*). There has been no interference with any drainage system that affects respondent's land (*id.*). Any depreciation

on the market value of respondent's land from the 1926 price level has not been due to the passage of the 1928 Act, nor has it been the result of any action on the part of the United States through its officers, agents, or employees (R. 364).

On the basis of these findings, the District Court concluded, as a matter of law, that there had been no taking of respondent's property within the meaning of the Fifth Amendment (R. 368), and entered judgment for the United States (R. 94-96). The Circuit Court of Appeals, with Judge Woodrough dissenting, reversed the judgment and remanded the cause for further proceedings (R. 421).

#### **SPECIFICATION OF ERRORS TO BE URGED**

The court below erred—

1. In holding that there was a "taking" of respondent's property within the meaning of the Fifth Amendment.

2. In rejecting the finding of the District Court, supported by the evidence, that the Boeuf Basin floodway had never been begun, and in making the contrary finding that it was 90 percent complete and in operative condition.

3. In rejecting the finding of the District Court, supported by the evidence, that the protection afforded to respondent's land had been increased since the passage of the 1928 Act, and in making the contrary finding that respondent's protection from floods has been decreased.

4. In failing to hold that the Boeuf floodway has been abandoned by the Act of June 15, 1936, and in

making the contrary holding that the Boeuf floodway is in operative condition.

5. In holding that Congress, by the passage of the Flood Control Act of 1928, has adopted the Jadwin Plan as a fixed project in all of its essential features.

6. In holding that Congress, by the passage of the Flood Control Act of 1928, has assumed exclusive control of the fuseplug levee, thereby excluding property owners from their right of self-defense against floods.

7. In failing to hold that respondent's land was subject to a servitude of flooding.

8. In reversing the judgment in favor of the United States.

#### REASONS FOR GRANTING THE WRIT

##### I

THE DECISION OF THE COURT BELOW THAT RESPONDENT'S LAND HAS BEEN "TAKEN" WITHIN THE MEANING OF THE FIFTH AMENDMENT IS IN PROBABLE CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT

A. The decision below is in probable conflict with *Sanguinetti v. United States*, 264 U. S. 146, and *Willink v. United States*, 240 U. S. 572, in which the elements of a "taking" have been defined.

In the *Sanguinetti* case a canal and diversion had been built to divert certain waters. The canal proved inadequate, and as a result the plaintiff's land was flooded. The land would have been flooded anyway, but to what extent did not appear.

The land was not permanently flooded, nor was it rendered useless for agriculture. The Court, reviewing the decisions, held that there had been no taking (264 U. S. at p. 149):

Under these decisions \* \* \* in order to create an enforceable liability against the Government, it is, at least, necessary that the overflow be the direct result of the structure, and constitute an actual, permanent invasion of the land, amounting to an appropriation of and not merely an injury to the property. \* \* \* Prior to the construction of the canal the land had been subject to the same periodical overflow. If the amount or severity thereof was increased by reason of the canal, the extent of the increase is purely conjectural. Appellant was not ousted nor was his customary use of the land prevented, unless for short periods of time. \* \* \*

In the *Willink* case, in which the Government had moved a harbor line to include plaintiff's property, the Court reached the same conclusion, stating (240 U. S. at p. 579):

There was no actual taking of any of the claimant's property, nor any invasion or occupation of any of his land. As respects his upland, he was not in any wise excluded from its use, nor was his possession disturbed. Something more than the location of a harbor line across the land was required to take it from him and appropriate it to public use.



See also *Transportation Co. v. Chicago*, 99 U. S. 635, 642; *United States v. Lynah*, 188 U. S. 445, 470-471; *United States v. Cress*, 243 U. S. 316, 327-328.

We submit that the present case is directly within those decisions. Respondent's land, which is in the alluvial bed of the Mississippi River and has always been subject to flooding at frequent intervals, has not been invaded or disturbed. Her use, possession, and control, of her land has not been interfered with in any manner. No flood water has been diverted on her land. In fact, no flood has reached her property since 1927. No drainage system has been affected. In short, there has been, as in the *Sanguinetti* and *Willink* cases, a complete absence of any of the factors which constitute an appropriation for public use. The apprehension of a future taking does not, of course, warrant the recovery of compensation. *Peabody v. United States*, 231 U. S. 530; *Court of Marion County, W. Va. v. United States*, 53 C. Cls. 120, 150-151; *Kirk v. Good*, 13 F. Supp. 1020, 1021 (E. D. Mo.).

B. The decision of the court below is also in conflict with the decision of this Court in *Hughes v. United States*, 230 U. S. 24. In that case the United States constructed a new levee behind plaintiff's property in place of the old levee which had been between the property and the river. The lower court there had allowed a recovery on the ground that the change has placed an additional burden upon the property by subjecting it to more

frequent and destructive overflows. This Court reversed, on the ground that the plaintiff still had the same protection from the old levee and that he could not object because the United States had not chosen to build the new levee in front of his property. See also *Jackson v. United States*, 230 U. S. 1.

We submit that the present case is directly within the principle of this decision. The physical situation of respondent's land remains the same. The riverside levee remains at the same height and no liability can be fastened upon the United States simply because the height of the levee was not increased. Indeed, the present case is even stronger, for the District Court found (R. 362, 366) that the action taken by the United States under the 1928 Act has actually increased the protection for respondent's land over that which existed theretofore. Whereas her lands were formerly repeatedly subject to destructive overflows, they have not since been inundated, although there were great floods in 1929, 1935, and 1937 (R. 365). Moreover, the proposed plan for the Boeuf Basin floodway, has been abandoned by virtue of the Act of June 15, 1936, *infra*, p. 30. No guide levees have ever been built, and none ever will be. The riverside levee remains at the 1914 heights, and affords to respondent's property the same protection that it has always had, plus the additional protection that has been achieved by the strengthening of the levees on the

south bank of the Arkansas River and by the lowering of the Mississippi River through the scheme of channel stabilization. In fact, Congress has brought respondent's land within the doctrine of the *Hughes* case, *supra*, by specifically providing in Section 1 of the 1928 Act, *infra*, p. 24, that pending completion of any floodway the area within it shall be given the same degree of protection as is afforded by levees contiguous to the floodway.

C. It is difficult to state precisely the basis for the contrary conclusion of the majority of the court below. Apparently, however, the court assumed (1) that the flooding of respondent's land had become a "fixed fact" instead of, as formerly, a "casual and incidental happening" (R. 416); because (2) the Boeuf Basin floodway was substantially completed and in operative condition (R. 418-419); and (3) because Congress had deprived respondent of its right of flood fight by assuming exclusive jurisdiction over the fuseplug levee (R. 416). Finally, (4) the majority seemed to assume that their conclusion is supported by the decision in *Hurley v. Kincaid*, 285 U. S. 95. We submit that in each case the assumption is either unwarranted in fact or irrelevant in law.

(1) Actually, it is probably irrelevant whether or not respondent's land, which has been flooded frequently in the past, has been subjected to some purely conjectural increased liability to flooding. *Sanguinetti v. United States*, 264 U. S. 146, 199.

Cf. *Hughes v. United States*, 230 U. S. 24. Here, however, the District Court found as a fact that, due to the strengthening of the levees on the south side of the Arkansas River and the channel straightening and stabilization work, respondent's land enjoyed greater protection than it had prior to the passage of the 1928 Act (R. 362, 366). These findings, of course, were conclusive if supported by substantial evidence. *Wessel v. United States*, 49 F. (2d) 137, 139 (C. C. A. 8th); *United States v. Gamble-Skogmo*, 91 F. (2d) 372, 374 (C. C. A. 8th). The court below, however, without even advertent to these findings, concluded that respondent's land was subject to a greater hazard of flooding than before (R. 416-417). The District Court's finding, which was supported by the testimony and by the fact that serious floods since 1928 had not affected respondent's land (R. 159, 168, 171, 182, 243, 253), should have been deemed conclusive.

(2) The court below was apparently misled in this respect by its erroneous assumption that the Boeuf floodway was substantially completed and in operative condition at the time of the hearing (R. 418-419). The District Court found, on the contrary, that there had been no work whatever done on the floodway; that the riverside levee had not been changed; and that the guide levees had not been started (R. 359).



There is no question but that the District Court was correct in its finding. The difference apparently arises from the fact that the District Court found that the Boeuf floodway was a separate and independent project (R. 358), whereas the court below apparently assumed that the floodway was 90 percent finished (R. 418) because the whole flood-control plan on the Mississippi, as suggested by the 1928 Act, was completed to that extent. Obviously, however, the floodway cannot be so considered. Such an approach means, in effect, that respondent's land is taken by the action of the United States in increasing the height of the levees at other points—a proposition which has been specifically denied. *Jackson v. United States*, 230 U. S. 1. In addition, that approach means that the floodway does not require guide levees of any kind, a proposition contrary to the specific mandate of the Act itself (Section 1) that "all diversion works and outlets \* \* \* shall be built in a manner and of a character which will fully and amply protect the adjacent lands." Finally, that approach means that the floodway can exist without a fuseplug levee. The levee for considerable distances on each side of the fuseplug, approved by the President, p. 7, *supra*, is at the same height. Certainly the United States is not liable to owners of all land behind the other portions of the levee which remain at the 1914 level, yet they are in no different position than

respondent here.<sup>3</sup> The Boeuf floodway was never more than a plan, which has now been abandoned.

(3) Nor is the finding of the District Court that respondent's land had more, rather than less protection than it had in 1928 affected by the argument of the court below that Congress, by the 1928 Act, had assumed such absolute control over the levees that respondent no longer had a right of self-defense (R. 416). No liability attaches to the United States when in the exercise of its power over navigation and navigable waters it fixes the height at which levees may be constructed. *Matthews v. United States*, 87 C. Cls. 662, 718-719. See Sec. 1, Act of July 27, 1916 (c. 260, 39 Stat. 402; U. S. C., Title 33, Sec. 65), and *Gibson v. United States*, 166 U. S. 269, 276. But even if the contrary were true, in the present case Congress has ordered (Section 1) that, pending completion of the floodway, respondent's land was to be given its original protection. Actually, however, nothing in the Act indicates an assumption

<sup>3</sup> Moreover, the assumption that the Boeuf floodway is in operative condition is inconsistent with the further conclusion of the court (R. 419) that the Boeuf floodway has not been abandoned under the Act of June 15, 1936, *infra*, p. 30, because the Eudora floodway is not yet in operative condition. The only difference between the two floodways—the area subject to overflow—is determined by the guide levees, and if the Boeuf floodway was complete without them, so was approved. Respondent does not rely upon the fact that her land is in the Eudora floodway (R. 381).

was the Eudora Floodway, on the day the Act authorizing

of control. The War Department believes that the United States does not have such control, although it believes it would be desirable (Comm. Doc. No. 2, H. Comm. on Flood Control, 71st Cong., 1st Sess.; R. 252). The provision of Section 14 of the Act of March 3, 1899 (c. 425, 30 Stat. 1152; U. S. C., Title 33, Sec. 408), made applicable by Section 9 of the 1928 Act, and upon which respondent and apparently the court below relied, applies only to levees, etc., built by the United States, and consequently has no application to this levee which was built by local interests (R. 14-15). In fact, a provision to give the United States the control which the court below assumed to exist was in the original bill (S. 3740, 70th Cong., 1st Sess.) and was stricken out (69 Cong. Rec. 7114-7115).

(4) Finally, the extensive quotation (R. 417) by the court below from *Hurley v. Kincaid*, 285 U. S. 95, indicates that the court may have assumed that that case had decided the present question. The language, however, is plainly designated as an assumption—the most extreme possible in favor of the plaintiff there—in order to show that, whether or not the lands were taken, the injunctive relief there sought was inappropriate.

We submit, therefore, that the court below has misinterpreted and misapplied the decisions of this Court and that its action should be corrected.

## II

THE DECISION BELOW IS IN CONFLICT WITH THE DECISION OF THE COURT OF CLAIMS IN MATTHEWS V. UNITED STATES, 87 C. CLS. 662

In *Matthews, Trustee v. United States*, 87 C. Cls. 662, as in the present case, the plaintiff sought to recover for a "taking" of his land under the 1928 Flood Control Act, in circumstances very similar to those here. Plaintiff's land was located in the Birds Point Floodway, which was to be constructed by the building of a set-back levee some miles to the west of the riverside levee, and the reduction in height of portions of the latter by three feet. In times of flood, the river would overtop the reduced portions of the riverside levee and flow over plaintiff's land. The set-back levee had been built, but the riverside levee had not been cut down, when the suit was brought.

The Court of Claims denied recovery. It found no evidence that any additional water which might pass on the land would subject it to any additional servitude, and concluded (87 C. Cls. at pp. 720-721)—

Any action on the part of the Government which does not in and of itself encroach upon private property or valuable property rights by depriving the owner of the possession or use of a definitely existing right therein by the placing thereon of a burden or servitude, but which imposes only a temporary, occasional, or incidental injury or impairs the use of such property or property rights is



regarded as consequential damages and does not constitute a taking. The act of the Government or the clear intention to take such action must amount to a complete appropriation of a clearly existing property right. Contemplated or prospective encroachments, the direct effect and consequences of which are problematical and conjectural, do not give rise to an enforceable obligation to compensate.

It is apparent from the opinion that the Court of Claims would have found that no taking had occurred in the present case. Here *nothing* had been done in the construction of the floodway, and the project had been abandoned, whereas in the *Matthews* case the floodway was complete but for the lowering of the riverside levee. There is no distinction in principle between the two cases, and we submit that they are in direct conflict.

The decision below is also in direct conflict with the *Matthews* case in holding that there was a "taking" of respondent's land by the United States when it assumed control over the height of the fuse-plug levee. We have pointed out above (p. 18) that there is nothing to show that such control has been assumed, but the court below held to the contrary and further held that the result was to impose an additional burden on respondent's land for which the United States must pay compensation (R. 416). In the *Matthews* case, however, the court reached the opposite conclusion, stating (87 C. Cls. at p. 718):

The United States had the right, without liability, in the exercise of its lawful authority to control navigation and navigable waters, to fix the height at which the river-side levee might be constructed \* \* \*

### III

THE QUESTION AS TO WHAT ACTS CONSTITUTE A  
"TAKING" IS ALREADY PENDING IN THIS COURT

On May 15, 1939, this Court granted certiorari in the case of *Franklin v. United States*, No. 845, in which the Circuit Court of Appeals for the Sixth Circuit (101 F. (2d) 459) had held that the building of dykes into the bed of a river, which caused the channel to shift and wash away plaintiff's land, was not a "taking" within the meaning of the Fifth Amendment. The decision of that case will necessarily involve a consideration of the scope of the same decisions as are here involved. A review of this case, therefore, will impose little added burden upon the Court, but will materially aid in resolving conflicting interpretations of the prior decisions.

In addition, the decision in the *Franklin* case may be regarded by this Court as in conflict with the instant case. In the brief opposing certiorari in the former case the Government stated (p. 12 n) that it did not believe that the decisions were in conflict. The granting of the writ may indicate that the Court does not agree with that conclusion. If that be so, of course, the present case should also be reviewed.

## IV

THE QUESTION INVOLVED IS OF LARGE PUBLIC  
IMPORTANCE

A. The problem of flood control upon the Mississippi River, with its inevitable effect upon navigation and commerce, is one of extraordinary public importance. As history shows, constant experimentation is necessary, and each project is subject to change or abandonment in the light of cumulative experience. The court below did not fix the time when the taking occurred, but if, as respondent claims (R. 239), it occurred on January 10, 1929, when the construction of the guide levees was authorized, the decision is extremely significant with respect to whether the Government is free to abandon a project once it has been instituted. Compare *United States v. Yazoo & M. V. R. Co.*, 4 F. Supp. 366 (E. D. La.), rev'd., 67 F. (2d) 1019 (C. C. A. 5th). If the Government is forced immediately to pay prospective damages for permanent occupation, before the property is actually and irrevocably appropriated to public use, irrespective of whether the project is changed or abandoned, such a tremendous added cost would be imposed upon the United States as substantially to curtail, or even to prevent its possible participation in flood control work.

The present proceeding is a test case to determine whether the United States has "taken" the lands located in the Boeuf floodway. It is highly

important, therefore, that the correct result be reached, since that floodway is over 125 miles long and about 15 miles wide (see *Hurley v. Kincaid*, 285 U. S. 95, 100). In fact, there are already pending in the District Court of the United States for the Eastern District of Arkansas twelve cases, including the instant one, representing claims of about \$100,000. There are also pending, in the Court of Claims more than fifty cases, representing claims of several million dollars. All these cases deal with compensation for the alleged taking of property in the Boeuf Basin. Upon motion of the attorney for the respondent in the instant case all are being held in abeyance pending the final disposition of this case by this Court (R. 217-219).

#### CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

ROBERT H. JACKSON,  
*Solicitor General.*

MAY 1939.



## APPENDIX

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The Flood Control Act of May 15, 1928, c. 569, 45 Stat. 534 (U. S. C., Title 33, Sec. 702a *et seq.*) provides as follows:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the project for the flood control of the Mississippi River in its alluvial valley and for its improvement from the Head of Passes to Cape Girardeau, Missouri, in accordance with the engineering plan set forth and recommended in the report submitted by the Chief of Engineers to the Secretary of War dated December 1, 1927, and printed in House Document Numbered 90, Seventieth Congress, first session, is hereby adopted and authorized to be prosecuted under the direction of the Secretary of War and the supervision of the Chief of Engineers: Provided, That a board to consist of the Chief of Engineers, the president of the Mississippi River Commission, and a civil engineer chosen from civil life to be appointed by the President, by and with the advice and consent of the Senate, whose compensation shall be fixed by the President and be paid out of the appropriations made to carry on this project, is hereby created; and such board is authorized and directed to consider the engineering differences between the adopted project and the plans recom-*

mended by the Mississippi River Commission in its special report dated November 28, 1927, and after such study and such further surveys as may be necessary, to recommend to the President such action as it may deem necessary to be taken in respect to such engineering differences and the decision of the President upon all recommendations or questions submitted to him by such board shall be followed in carrying out the project herein adopted. The board shall not have any power or authority in respect to such project except as hereinbefore provided. Such project and the changes therein, if any, shall be executed in accordance with the provisions of section 8 of this Act. Such surveys shall be made between Baton Rouge, Louisiana, and Cape Girardeau, Missouri, as the board may deem necessary to enable it to ascertain and determine the best method of securing flood relief in addition to levees, before any flood-control works other than levees and revetments are undertaken on that portion of the river: *Provided*, That all diversion works and outlets constructed under the provisions of this Act shall be built in a manner and of a character which will fully and amply protect the adjacent lands: *Provided further*, That pending completion of any floodway, spillway, or diversion channel, the areas within the same shall be given the same degree of protection as is afforded by levees on the west side of the river contiguous to the levee at the head of said floodway, but nothing herein shall prevent, postpone, delay, or in anywise interfere with the execution of that part of the project on the east side of the river, including raising, strengthening, and enlarging the levees on the east side of the river. The

sum of \$325,000,000 is hereby authorized to be appropriated for this purpose.

All unexpended balances of appropriations heretofore made for prosecuting work of flood control on the Mississippi River in accordance with the provisions of the Flood Control Acts approved March 1, 1917, and March 4, 1923, are hereby made available for expenditure under the provisions of this Act, except section 13.

SEC. 2. That it is hereby declared to be the sense of Congress that the principle of local contribution toward the cost of flood-control work, which has been incorporated in all previous national legislation on the subject, is sound, as recognizing the special interest of the local population in its own protection, and as a means of preventing inordinate requests for unjustified items of work having no material national interest. As a full compliance with this principle in view of the great expenditure estimated at approximately \$292,000,000, heretofore made by the local interests in the alluvial valley of the Mississippi River for protection against the floods of that river; in view of the extent of national concern in the control of these floods in the interests of national prosperity, the flow of interstate commerce, and the movement of the United States mails; and, in view of the gigantic scale of the project, involving flood waters of a volume and flowing from a drainage area largely outside the States most affected, and far exceeding those of any other river in the United States, no local contribution to the project herein adopted is required.

SEC. 3. Except when authorized by the Secretary of War upon the recommendation of the Chief of Engineers, no money appro-

priated under authority of this Act shall be expended on the construction of any item of the project until the States or levee districts have given assurances satisfactory to the Secretary of War that they will (a) maintain all flood-control works after their completion, except controlling and regulating spillway structures, including special relief levees; maintenance includes normally such matters as cutting grass, removal of weeds, local drainage, and minor repairs of main river levees; (b) agree to accept land turned over to them under the provisions of section 4; (c) provide without cost to the United States, all rights-of-way for levee foundations and levees on the main stem of the Mississippi River between Cape Girardeau, Missouri, and the Head of Passes.

No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place: *Provided, however,* That if in carrying out the purposes of this Act it shall be found that upon any stretch of the banks of the Mississippi River it is impracticable to construct levees, either because such construction is not economically justified or because such construction would unreasonably restrict the flood channel, and lands in such stretch of the river are subjected to overflow and damage which are not now overflowed or damaged by reason of the construction of levees on the opposite banks of the river, it shall be the duty of the Secretary of War and the Chief of Engineers to institute proceedings on behalf of the United States Government to acquire either the absolute ownership of the lands so subjected to overflow and damage or floodage rights over such lands.

SEC. 4. The United States shall provide flowage rights for additional destructive flood waters that will pass by reason of diversions from the main channel of the Mississippi River: *Provided*, That in all cases where the execution of the flood-control plan herein adopted results in benefits to property such benefits shall be taken into consideration by way of reducing the amount of compensation to be paid.

The Secretary of War may cause proceedings to be instituted for the acquirement by condemnation of any lands, easements, or rights-of-way which, in the opinions of the Secretary of War and the Chief of Engineers, are needed in carrying out this project, the said proceedings to be instituted in the United States district court for the district in which the land, easement, or right-of-way is located. In all such proceedings the court, for the purpose of ascertaining the value of the property and assessing the compensation to be paid, shall appoint three commissioners, whose award, when confirmed by the court, shall be final. When the owner of any land, easement, or right-of-way shall fix a price for the same which, in the opinion of the Secretary of War is reasonable, he may purchase the same at such price; and the Secretary of War is also authorized to accept donations of lands, easements, and rights-of-way required for this project. The provisions of sections 5 and 6 of the River and Harbor Act of July 18, 1918, are hereby made applicable to the acquisition of lands, easements, or rights-of-way needed for works of flood control: *Provided*, That any land acquired under the provisions of this section shall be turned



over without cost to the ownership of States or local interests.

SEC. 8. The project herein authorized shall be prosecuted by the Mississippi River Commission under the direction of the Secretary of War and supervision of the Chief of Engineers and subject to the provisions of this Act. It shall perform such functions and through such agencies as they shall designate after consultation and discussion with the president of the commission. For all other purposes the existing laws governing the constitution and activities of the commission shall remain unchanged. The commission shall make inspection trips of such frequency and duration as will enable it to acquire first-hand information as to conditions and problems germane to the matter of flood control within the area of its jurisdiction; and on such trips of inspection ample opportunity for hearings and suggestions shall be afforded persons affected by or interested in such problems. The president of the commission shall be the executive officer thereof and shall have the qualifications now prescribed by law for the Assistant Chief of Engineers, shall have the title brigadier general, Corps of Engineers, and shall have the rank, pay, and allowances of a brigadier general while actually assigned to such duty: *Provided*, That the present incumbent of the office may be appointed a brigadier general of the Army, retired, and shall be eligible for the position of president of the commission if recalled to active service by the President under the provisions of existing law.

The salary of the president of the Mississippi River Commission shall hereafter

be \$10,000 per annum, and the salary of the other members of the commission shall hereafter be \$7,500 per annum. The official salary of any officer of the United States Army or other branch of the Government appointed or employed under this Act shall be deducted from the amount of salary or compensation provided by, or which shall be fixed under, the terms of this Act.

SEC. 9. The provisions of sections 13, 14, 16, and 17 of the River and Harbor Act of March 3, 1899, are hereby made applicable to all lands, waters, easements, and other property and rights acquired or constructed under the provisions of this Act.

The Act of June 15, 1936 (c. 548, 49 Stat. 1508; U. S. C. Supp., Title 33, Sec. 702a-2, *et seq.*) amending the Flood Control Act of 1928, provides as follows:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the project for the control of floods of the Mississippi River and its tributaries, adopted by Public Act Numbered 391, approved May 15, 1928 (45 Stat. 534), Seventieth Congress, entitled "An Act for the control of floods on the Mississippi River and its tributaries, and for other purposes", is hereby modified in accordance with the recommendations of section 43 of the report submitted by the Chief of Engineers to the Chairman of the Committee on Flood Control, dated February 12, 1935, and printed in House Committee on Flood Control Document Numbered 1, Seventy-fourth Congress, first session, as hereinafter further modified and amended; and as so modified is hereby adopted and authorized and directed to be prosecuted

under the direction of the Secretary of War and the supervision of the Chief of Engineers.

SEC. 2. That the Boeuf Floodway, authorized by the provisions adopted in the Flood Control Act of May 15, 1928, shall be abandoned as soon as the Eudora Floodway, provided for in Flood Control Committee Document Numbered 1, Seventy-fourth Congress, first session, is in operative condition and the back-protection levee recommended in said document, extending north from the head of the Eudora Floodway, shall have been constructed.

\* \* \* \* \*

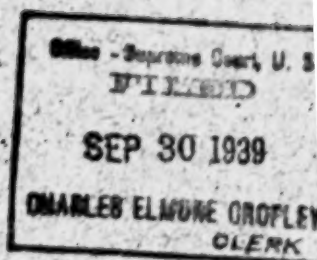
SEC. 10. After the Eudora Floodway shall have been constructed and is ready for operation, the fuse-plug levees now at the head of the Boeuf and Tensas Basins shall be constructed to the 1914 grade and the 1928 section. The fuse-plug levees at the head of the Atchafalaya Basin on the west side shall be constructed to the 1914 grade and the 1928 section. The fuse-plug levees at the head of the Atchafalaya Basin on the east side of the Atchafalaya River shall be constructed to the 1914 grade and 1928 section, and, after the Morganza Floodway has been completed, shall be raised to the 1928 grade as provided in section 3 of this Act. Thereafter those stretches of said levees which are left as fuse-plug levees shall be reconstructed and maintained as herein provided, subject to the provisions of section 3 of this Act. Any funds appropriated under authority of this Act may be expended for this purpose.







FILE COPY



No. 72

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*In the Supreme Court of the United States*

OCTOBER TERM, 1939

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UNITED STATES OF AMERICA, PETITIONER

v.

MRS. JULIA CAROLINE SPONENBARGER ET AL.

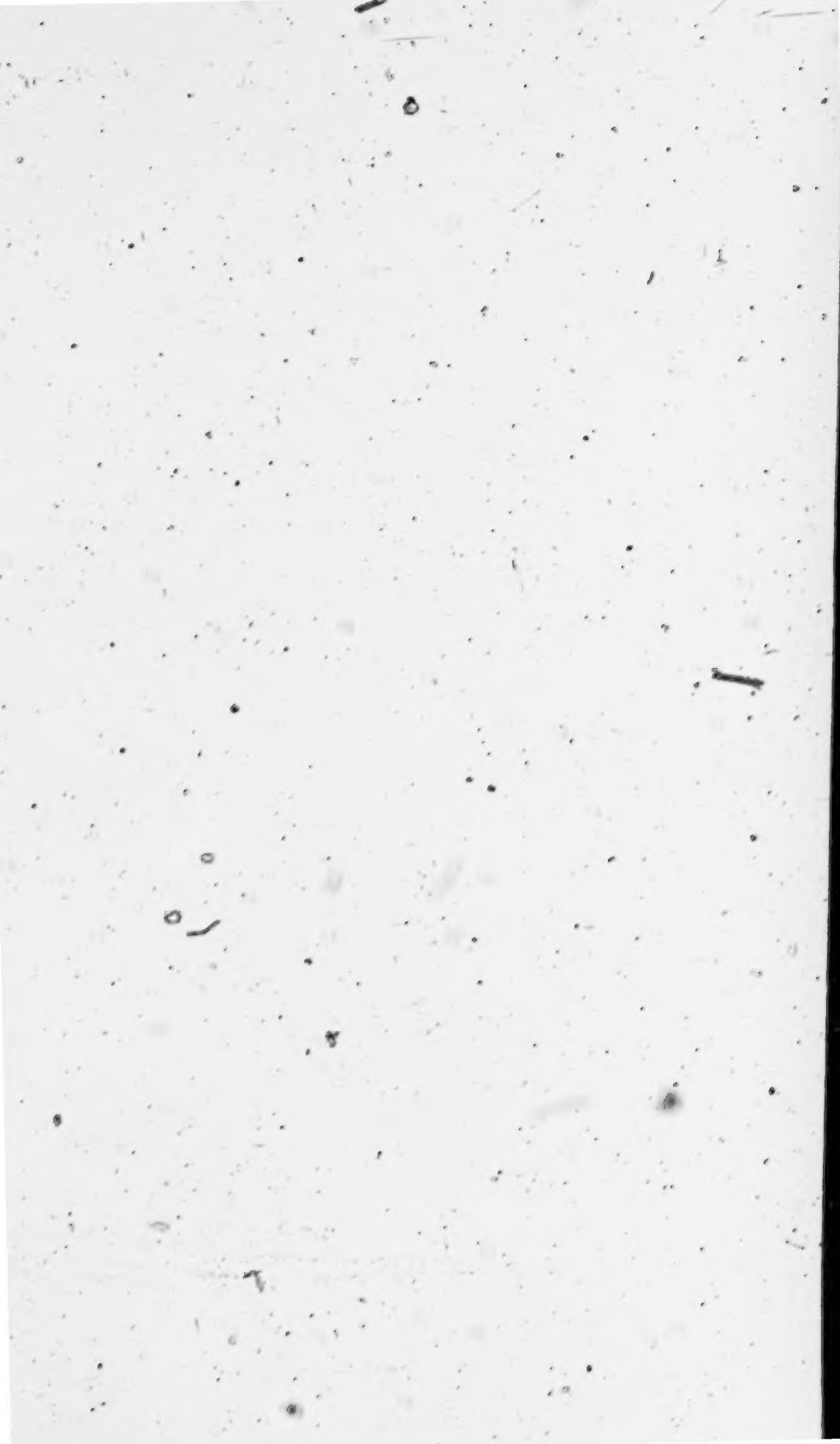
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ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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BRIEF FOR THE UNITED STATES

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# **In the Supreme Court of the United States**

OCTOBER TERM, 1939

---

No. 72

UNITED STATES OF AMERICA, PETITIONER

v.

MRS. JULIA CAROLINE SPONENBARGER ET AL.

---

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIR-  
CUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

---

**BRIEF FOR THE UNITED STATES**

---

## **OPINIONS BELOW**

The opinion of the District Court (R. 376-390) is reported in 21 F. Supp. 28, and its opinion on motion for a new trial (R. 92-94) is reported in 21 F. Supp. 895. The opinion of the United States Circuit Court of Appeals for the Eighth Circuit (R. 410-421) is reported in 101 F. (2d) 506.

## **JURISDICTION**

The judgment of the United States Circuit Court of Appeals for the Eighth Circuit was entered on February 9, 1939 (R. 421). A petition for rehearing was denied on February 27, 1939 (R. 425). The

petition for a writ of certiorari was filed on May 26, 1939, and granted on June 5, 1939. The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

#### QUESTION PRESENTED

Whether, in the circumstances of the present case, the United States has "taken" respondent's property within the meaning of the Fifth Amendment, and has thereby become liable to pay just compensation therefor.<sup>1</sup>

#### STATUTES INVOLVED

The relevant portions of the statutes involved are set out in the Appendix, *infra*, pp. 78-93.

#### STATEMENT

This suit, which was brought under Section 24 (20) of the Judicial Code, was begun by the filing of a petition on August 11, 1934, by respondent Julia C. Spönenbarger (R. 4-16). In general, the petition alleged that by the Flood Control Act of 1928 and certain acts of the United States in connection therewith, respondent's land had been damaged, and that the usefulness, enjoyment, and value of her property had been destroyed. Compensation was sought for the taking (R. 5, 15-16). A demurrer to the petition (R. 17) was overruled (R. 18), and the United States answered (R. 77-

<sup>1</sup> Respondent may urge that the judgment may be supported under Section 4 of the Act of May 15, 1928, *infra*. This question is also considered in this brief.

80). Certain interveners were made parties upon the motion of the United States (R. 25), and thereafter entered appearances (R. 28, 30, 32, 52, 66).<sup>2</sup>

The District Court, after a full trial, made extensive findings of fact and conclusions of law (R. 389, 350-366, 368-375), and filed an opinion (R. 376-390). These findings may be summarized as follows:—

*Location and character of respondent's property.*—The respondent is the owner of 40 acres of land in Desha County, Arkansas, situated about two miles west of Arkansas City and the Mississippi River (R. 357). It is in the so-called "middle section" of the alluvial valley of the river (R. 352). The land lies in the basin of the Boeuf River, which rises in the northern part of Desha County and flows south to the Ouachita River in Louisiana. This natural basin, which is part of a larger basin known as the Tensas Basin, lies between the Macon Ridge on the east and the highlands on the west, forming a natural floodway for water from the Mississippi River on the east, and the Arkansas and White Rivers to the north (R. 357).<sup>3</sup> All property

<sup>2</sup> We do not discuss these other respondents—lienors or claimants of the property—for the reason that their rights depend entirely upon the rights of respondent Sponenbarger. The District Court, for that reason, made no findings with respect to them (R. 389).

<sup>3</sup> For the convenience of the Court, p. 94, contains a general map of the Tensas Basin, lying between the Arkansas River on the north, the Mississippi River on the east, and the Red River on the south. In addition, nine

in the basin lies in the natural high-water bed of the Mississippi River and has always subject to the servitude of flooding (R. 354, 356, 357).

Respondent's land has been repeatedly overflowed by deep high water, and has never been entirely free from overflow notwithstanding the construction of strong levees (R. 357). The land was flooded in 1912, 1913, 1919, 1921, and 1922, and in 1927 the buildings and improvements on the land were destroyed by the flood of that year, which inundated the land to a depth of 15 or 20 feet (R. 357-358, 362). All improvements located on land immediately behind levees along the main stem of the Mississippi River, including those of respondent, are at all times of the flood stage of the river subject to extreme hazards (R. 363). They have no assurance against destruction by the breaking of the levees and the natural crevassing due to the floodwater, irrespective of the height and strength of the levee (*id.*). Moreover, it is impossible to predict accurately what stages a flood may reach (*id.*).

*The Jadwin flood-control plan.*—Following the disastrous and unprecedented flood of 1927, which caused general devastation in the area where this land is situated, the Chief of Engineers of the Army, Major General Edgar Jadwin, recommended to the Secretary of War a plan for flood control on

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copies of a detailed map showing the territory have been filed with the Clerk.



the Mississippi River and its tributaries (R. 358). This plan, known as the Jadwin plan, was transmitted by the Secretary of War to the President, and by him to Congress (H. Doc. No. 90, 70th Cong., 1st Sess.) (R. 353.)<sup>4</sup>

The Jadwin Plan was a comprehensive one, dealing with the whole alluvial valley, and designed to protect it against the greatest foreseeable flood (R. 353, 354-355). It proposed to combine several devices to that end. Levees were to be strengthened and raised slightly (R. 354). Lateral diversion channels were proposed as safety valves, in the form of floodways of two kinds, one headed by controlled spillways through which water could be diverted from the main channel of the river and the other headed by levees of lower grade than adjacent levees (designated as fuse-plug levees) over or through which water would escape into the floodways whenever it should overtop or crevasse them (R. 354).<sup>5</sup> By these floodways it was thought to

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<sup>4</sup> For the convenience of the Court, nine copies of this document, hereinafter referred to as the Jadwin Report, have been filed with the Clerk.

<sup>5</sup> The various terms may be defined, for present purposes, as follows: A *spillway* is a concrete or masonry structure in a levee, designed to pass water from a higher to a lower elevation by means of gates. The operation, thus, is fully controlled. A *fuseplug* is a portion of a line of continuous levee, usually of relatively lower height and weaker section than the rest of the levee, intended to be overtopped by water at a flood stage lower than that which would threaten the main levees, and to provide an entrance into a diversion channel or floodway designed to carry excess water, usually

relieve the congestion of the main channel of the river and to increase its safe flow capacity within the normal confines of the riverside levees. Jadwin Report, Secs. 3, 13-19. The water was intended to flow through leveed channels, thereby confining its spread within the floodways to a minimum (R. 356). The fuse-plug levee for the Birds Point floodway involved the lowering of the existing levees; in the others they were to remain unchanged. Channel stabilization and navigation improvement were a part of the general project (R. 354, 355).

The plan contemplated the creation of a floodway down the Boeuf River Basin, where respondent's land is located (R. 355). The Boeuf River bottom was selected for this overflow because it was thought to have the best width and to be the most suitably located to receive the water, was the most direct route, and was largely undeveloped swamp-land (R. 356). The entrance to the floodway was to be headed by a fuseplug levee at the then existing grade, corresponding to 60.5 feet on the Arkansas City gauge (R. 356, 357). The contiguous levees on the Mississippi and Arkansas Rivers were to be raised about 3 feet (R. 356). In order to limit the land in the Boeuf Basin that would be overflowed by excess floods, so-called guide levees were to be constructed, where natural ridges would not serve, on each side of the Boeuf River bottom, from the

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laterally from the main channel of the river. See H. Rept. No. 1072, Comm. on Flood Control, 70th Cong., 1st Sess., pp. 371, 372.

proposed fuse-plug levee to the lower Tensas Basin (*id.*). The west guide levee was to begin just below Rohwer and the east guide levee at Luna Landing, with the fuseplug levee, about 33 miles long, in between these two points (R. 356-357). (See Plaintiff's Exhibit 24, R. 396.) Since the purpose of the fuseplug was to provide an escape for excess water down the leveed floodway only when the flood volume should exceed the safe capacity of the main channel of the river (R. 354), the floodway would operate only when the water reached a height above 60.5 feet on the Arkansas City gauge (R. 356). That height had been reached only once, in 1927 (*id.*). The lands in the floodways were to receive better protection they had theretofore enjoyed, with the result that they were protected against any recorded flood that had occurred, except that of 1927, and possibly, those of 1912 and 1882 (R. 355).

*Action taken pursuant to the Plan.*—The Jadwin Plan was only tentative and general in character—a mere outline of flood control in the alluvial valley of the Mississippi River (R. 360). General Jadwin himself recognized that details of the design and location of the engineering works had yet to be worked out and recommended that the task be entrusted to the Chief of Engineers (*id.*). Congress, in the Flood Control Act of 1928 (Act of May 15, 1928; c. 569, 45 Stat. 534; U. S. C., Title 33, Sec. 702a) adopted the general engineering plan, but did not adopt all the features of the Plan, espe-

cially in view of the engineering differences between it and a plan submitted by the Mississippi River Commission (R. 352, 359). Section 1 of the Act provides, in part:

That the project for the flood control of the Mississippi River in its alluvial valley and for its improvement from the Head of Passes to Cape Girardeau, Missouri, in accordance with the engineering plan set forth and recommended in \* \* \* House Document Numbered 90 \* \* \* is hereby adopted and authorized to be prosecuted under the direction of the Secretary of War and the supervision of the Chief of Engineers: \* \* \*

Section 1 also provides for the creation of a Board (the Mississippi River Flood Control Board) to consider the differences in engineering detail between the Jadwin Plan and the report of the Mississippi River Commission, and to make recommendations to the President, whose decisions should be final. The Board reported on August 8, 1928 (Comm. Doc. No. 28, H. Comm. on Flood Control, 70th Cong., 2d Sess.), and on January 10, 1929, President Coolidge approved the construction of the guide levees in the Boeuf Floodway and the acquisition of rights-of-way for those levees (R. 379; Comm. Doc. No. 2, H. Comm. on Flood Control, 71st Cong., 1st Sess.). On July 1, 1929, a suit was begun by the United States to condemn certain lands (not involved here) for rights-of-way for these guide levees, and an injunction issued against

interference with the agents of the United States in taking possession of such lands (R. 129-130). No further proceedings were had, and on December 18, 1934, the suit was dismissed upon the motion of the United States Attorney (R. 130).

Thereafter, pursuant to the general authority of the Mississippi River Commission, independent of the 1928 Act, the levees on the south side of the Arkansas River (which had failed to provide protection against the 1927 flood) were reconstructed and raised, giving the Boeuf Basin additional protection; more protection, in fact, than ever theretofore enjoyed (R. 362). Moreover, by means of cut-offs the Mississippi River was shortened by 100 miles between Arkansas City and the Old River,\* and its channel deepened by dredging (R. 360). As a result, the height of the river has been lowered 5 or 6 feet. In the flood of 1937 there was a 20 percent greater flow past Arkansas City (2,100,000 second-feet) than in 1929 (1,800,000 second-feet), with a five-foot lower stage (R. 360-361). The greatest improvement has been in the vicinity of the proposed Boeuf River fuseplug (R. 360), and has afforded additional protection to the land of respondent (R. 362). It was estimated

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\*The Old River is the channel by which the Red River flows into the Mississippi (see, detailed map). The testimony upon which the finding is based shows that the 272 miles between the Arkansas and Old Rivers was reduced by 100.6 miles, including one natural cut-off made in 1929 (R. 241).



by a witness that the 1927 flood involved a flow of 2,460,000 second-feet (R. 261). This would indicate under the findings that a flood of similar proportions could now be carried without overflow at Arkansas City (see R. 360-361).

The Boeuf River Floodway, which was a separate and independent project provided for by the 1928 Act, was never begun (R. 358-359), due to "local opposition" and to injunction (R. 380). See *Hurley v. Kincaid*, 285 U. S. 95. No work was ever commenced on its construction and nothing has been done toward the prosecution of this part of the plan (R. 359). The guide levees were never definitely located as an engineering fact (R. 356), and nothing has been done toward their construction (R. 359). The levee has been left at the 1914 grade for a distance of about 60 miles, from Yancopin to Vacluse, whereas the contemplated fuseplug levee was to have been only about 33 miles in length (R. 357). By the Act of June 15, 1936, *infra*, p. 89, Congress abandoned the Boeuf Floodway project, and in lieu thereof has provided for the Eudora Floodway. (R. 358-359). The Boeuf Floodway is no longer considered a part of the plan for flood control (R. 361).

*Effect of the Plan on respondent's land.*—The construction of cut-offs and channel stabilization and the reconstruction of the levees on the south

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<sup>7</sup> According to the present tentative locations, as indicated by the map on page 94, respondent's land will also be in the Eudora Floodway.

bank of the Arkansas River, together with strengthening the levees elsewhere on the Mississippi, have resulted in a greater protection and security to respondent's land than it has ever before had (R. 362, 366). The work done in other localities pursuant to the 1928 Act has in no way reduced the levee protection to respondent's property or increased the flood hazard (R. 366). Whereas respondent's land was repeatedly subject to overflow prior to the passage of the 1928 Act, it has not been inundated since the passage of the Act despite the fact that three great floods, those of 1929, 1935, and 1937, have since occurred (R. 365).

Respondent's use, possession, and control of her land have not been interfered with or molested by the United States (R. 364). Neither it nor its officers have diverted any floodwaters into the floodway (R. 365). No additional servitude has been placed upon respondent's land (*id.*). There has been no interference with any drainage system that affects respondent's land (*id.*). Any depreciation on the market value of respondent's land from the 1926 price level has not been due to the passage of the 1928 Act, nor has it been the result of any action on the part of the United States through its officers, agents, or employees (R. 364).

On the basis of these findings, the District Court concluded, as a matter of law, that there had been no taking of respondent's property within the meaning of the Fifth Amendment (R. 368), and entered judgment for the United States (R. 94-96). The Circuit Court of Appeals, with Judge Wood-

rough dissenting, reversed the judgment and remanded the cause for further proceedings (R. 421).

**SPECIFICATION OF ERRORS TO BE URGED**

The court below erred—

1. In holding that there was a "taking" of respondent's property within the meaning of the Fifth Amendment.

2. In rejecting the finding of the District Court, supported by the evidence, that the Boeuf Basin floodway had never been begun, and in making the contrary finding that it was 90 percent complete and in operative condition.

3. In rejecting the finding of the District Court, supported by the evidence, that the protection afforded the respondent's land had been increased since the passage of the 1928 Act, and in making the contrary finding that respondent's protection from floods has been decreased.

4. In failing to hold that the Boeuf floodway has been abandoned by the Act of June 15, 1936, and in making the contrary holding that the Boeuf floodway is in operative condition.

5. In holding that Congress, by the passage of the Flood Control Act of 1928, has adopted the Jadwin Plan as a fixed project in all of its essential features.

6. In holding that Congress, by the passage of the Flood Control Act of 1928, has assumed exclusive control of the fuse-plug levee, thereby exclud-

ing property owners from their rights of self-defense against floods.

7. In failing to hold that respondent's land was subject to a servitude of flooding.

8. In reversing the judgment in favor of the United States.

#### SUMMARY OF ARGUMENT

##### I

This is a test case for lands lying in the proposed Boeuf Floodway project; while respondent's lands are included both in the formerly projected Boeuf Floodway and in the proposed Eudora Floodway the effect of the latter project is not and cannot be an issue here. The lands in the Boeuf Floodway now have more flood protection than they have ever before received. In the event of a sufficiently severe flood her lands are almost certain to be flooded, but this was the case before. It would be a travesty upon the principle of "just compensation" to hold the Government liable for a taking because of conjectured flood waters when, from 1912 to 1927, the lands were six times flooded, while from 1928 to 1939 they have not once been flooded, although the latter period includes three great floods.

But even if respondent were somehow to show that the Boeuf project involved the taking of her flowage rights, she must in addition show that the taking has already happened. Admittedly the Boeuf Floodway was never completed and has been

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abandoned under an Act of Congress. Respondent finds the compensable taking in various acts related to the entire flood-control project. None of these has involved any interference with her land or has increased its susceptibility to floods over its former condition. Respondent's position, in essence is that because the Government *once* intended to link the various projects with the Boeuf Floodway the land in that floodway must be held to have been taken though the project has been abandoned. This argument, if accepted, would impose an impossible burden upon the vast and difficult problem of Mississippi River flood control.

Since 1820 Congress has been concerned with the Mississippi floods. After 1883 the projects in general followed the principle of confining the river to levees, trusting that the water would cut a deeper channel and carry a greater volume. The disastrous flood of 1927, however, caused a radical change in flood-control methods. The Jadwin Plan and the Flood Control Act of May 5, 1928 adopted a broad and flexible engineering plan. Under that plan, as under all previous forms of control, there is full recognition of the necessity of a continual change in plans, as experience and the shifting problems of the river suggest modifications, minor or drastic.

There will, therefore, invariably be constant changes in flood-control plans. To impose liability on the United States simply because a plan was proposed and adopted, although not pushed to com-

pletion or an actual taking, would thrust upon flood control an impossible burden. The Boeuf Floodway, once projected and now abandoned, is over 125 miles long and is 15 miles wide. Respondent's arguments, pushed to their extreme, would impose a catastrophic liability upon the Government which has no basis in the actual steps taken in the flood-control program.

## II

A. There has been no taking of the respondent's property within the meaning of the Fifth Amendment. The District Court has found, upon substantial evidence, that the Boeuf Floodway was never begun, that the guide levees, essential to its operation, were never constructed or even definitely located. Furthermore, the Boeuf Floodway project was abandoned by the Act of June 15, 1936, *infra*, p. 89, and is no longer considered a part of the navigation and flood-control program. The United States has not interfered in any manner with the respondent's use, possession and control of her land. That land, which has been frequently flooded in the past, despite the construction of strong levees, has not been reached by floodwater since 1927. No additional servitude had been placed upon it. Its physical situation remains unchanged. The levee protection has not been decreased, the riverside levee remaining at its 1914 grade for a distance of 60 miles, but has, indeed, been increased by the strengthening of levees on the south bank of

the Arkansas River and by the construction of cut-offs and channel stabilization in the Mississippi River. Any decrease in the value of respondent's land was not due to any act on the part of the United States but largely to extraneous factors, such as the low price of cotton, burdensome taxation, and the flood of 1927.

B. The passage of the 1928 Act did not effect a taking of property. *Willink v. United States*, 240 U. S. 572. Nor was there any taking by reason of the proclamations of the President approving the proposed policy and method of flood control and authorizing the construction of guide levees in the Boeuf Basin.

C. The contention of the respondent that a taking was effected by the purported assumption, by the United States, of control over the riverside levee, excluding her from the right of self-defense, is without merit. The Act contains nothing indicating such control. The District Court found that the Act did not restrict respondent's right of flood-fight. In any event, even if such control had been assumed, the United States has power to control the height of levees in the interests of commerce and navigation, without liability to land-owners injured thereby. *Jackson v. United States*, 230 U. S. 1. Furthermore, such assumption of control by the United States would not have subjected the respondent to injury, since Section 1 of the Act specifically provides that, pending comple-

tion of the floodway, the land within it shall be protected by the United States.

D. The work done by the United States in the instant case did not effect a taking: *Jackson v. United States*, *supra*; *Hughes v. United States*, 230 U. S. 24. Far from increasing the flood hazard to respondent's land, the work done by the United States gave the land greater protection than it had ever theretofore enjoyed. The floodway has never been constructed. The guide levees are not "immaterial details" but are essential to the project and constitute almost the only difference between the Boeuf Floodway and the Eudora Floodway, in favor of which the former was abandoned. In the absence of guide levees no greater burden is imposed upon respondent's land than upon all land in the Boeuf Basin. The success of any contrary contention would compel the Government to purchase flowage rights over land which, after the construction of guide levees, would be protected from floods—a result patently not intended by Congress. Section 1 of the Act, *infra*, p. 80-81, contains the express mandate that all diversion works should be so built as to protect adjacent lands. Furthermore, no fuseplug exists. The riverside levee remains at the 1914 grade for a distance of 60 miles, while the proposed fuseplug was to be only 33 miles long. This was required by the last proviso of Section 1 of the Act. The existence of a fuseplug is not merely a matter of physical fact, but depends

largely upon intent, and the purpose to which a section of the levee is to be put.

The work done elsewhere along the river did not effect a taking of respondent's property. The projected Boeuf Floodway was a separate project included in the entire plan. There is no deterministic doctrine that a plan to take crystallizes into a completed taking as soon as the first shovelful of earth is turned. There must be at least work which constitutes an actual interference with property rights. A present apprehension of a future taking does not warrant the recovery of compensation. *Peabody v. United States*, 231 U. S. 530; *Portsmouth Co. v. United States*, 260 U. S. 327. Under the rule of those cases, no "abiding purpose" to take respondent's property could be shown in this case.

### III

A. Section 4 of the Act, *infra*, p. 83, which provides that the United States shall "provide flowage rights for additional destructive flood waters that will pass by reason of diversions from the main channel of the Mississippi", does not affect the liability of the United States in any way. It does not authorize any action against the United States but is merely a direction to Federal officers that flowage rights must be acquired before water is actually diverted.

B. Even if the Section undertook to establish a liability beyond the Constitution, it would be in-



applicable here. The language of the statute and its legislative history unite to show that it relates only to the case where (1) there is a deliberate diversion, (2) with the result, or reasonably predictable result, (3) that additional damage will result from floodwaters which would not otherwise have passed over the land.

C. Such has been the administrative construction, both by the President and the Chief of Engineers. It was explicitly reported to Congress which, in the Act of June 15, 1936, did not amend Section 4, but adopted the engineering modifications recommended by the Chief of Engineers. The administrative construction seems, therefore, to have been ratified.

Thus the respondent's remedy can only be under the Constitution and, as shown above, there is no liability on the part of the United States under the Fifth Amendment in the instant case.

## ARGUMENT

### I

#### THIS CASE AND MISSISSIPPI FLOOD CONTROL

The present proceeding is a test case (R. 217-219) brought to determine whether the United States has taken, and has thereby become liable to pay just compensation for, lands in the bed of the Boeuf Floodway project.

1. The lands of the respondent, it is true, lie both in the formerly projected Boeuf Floodway and in

the proposed Eudora Floodway. But, for the purposes of this case and at the present time, the Eudora Floodway is not in issue. Respondent's complaint (R. 4-16) makes no mention of any taking because of the Eudora Floodway. The case was tried solely on the theory that just compensation was due because of the Boeuf Floodway project. Respondent, as the District Court noted (R. 381), disclaimed any reliance on the fact that her land was also in the Eudora project. In the court below, respondent's brief (p. 15) argues that the Eudora project "is dead." Even if this were not the case, the Eudora Floodway at this moment is no more than a series of sketches and plans in the files of the Engineers Corps of the United States Army. Under present plans it will some day be constructed. But flood-control plans for the Mississippi shift their course fully as rapidly as does the river, and it is by no means certain that construction will ever be commenced. The suit, then, as respondent has confined it and as the facts require, is necessarily limited to the taking resulting from the Boeuf Floodway project.

2. Our argument will develop the propositions that there has been no taking of respondent's land, and that the flood protection is, on the contrary, better than the lands have ever before received. But even if respondent were somehow to show that flowage rights would have been taken under the completed Boeuf project, even though in fact

the land is better protected, she faces an equally difficult hurdle before a claim for just compensation can be established. She must in addition show that she can recover just compensation simply because her land is located in a *projected* floodway. The question here is plainly not whether property which lies in the bed of a complete and operative floodway is "taken" in the constitutional sense. Admittedly, the Boeuf floodway has not been completed, and never will be. Act of June 15, 1936, Section 2, *infra*, p. 89. Rather, the question here is whether, the floodway having been abandoned, there have been any acts by the United States which can properly be said to have constituted a taking of respondent's property and the property of other landowners similarly situated. None of the acts of the Government, as we understand respondent's argument and the opinion of the court below, would be urged as a taking if it were not that they were part of a plan which at one time included the Boeuf Floodway project. In short, because the Government *once* intended to link the various projects with the Boeuf Floodway, land in that floodway must be held to be taken even though the Boeuf project has been abandoned. We cannot believe, however, that the Constitution imposes a liability for property taken under a plan which has not been and will not be executed.

The far reach of respondent's position can best be illustrated against the background of a sum-

mary sketch of the history of Mississippi flood control.\*

The Mississippi River serves as a drainage channel for almost two-thirds of the States. It flows for a distance of over 2,400 miles, from northern Minnesota to the Gulf of Mexico. By reason of its importance to navigation and commerce, it has been an object of Congressional attention since 1820.<sup>9</sup> Thereafter, continuous studies of the river and the accumulation of recorded data concerning its behavior and characteristics resulted in the extension of the interest of the United States to problems of flood control, both as such and as a factor in navigation. In 1871 Congress directed the Secretary of War to establish systematic, daily gauging of the river at certain points (16 Stat. 598). Federal participation in the work was extended in 1879. After Congress in 1875 had received a report from the so-called Levee Commission, which ascribed the failure of the existing levee system largely to the absence

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\* The sources from which the information contained in the remainder of this statement has been drawn include, mainly: Statement of Brig. Gen. M. C. Tyler, now President of the Mississippi River Commission, made before the Flood Control Committee of the House of Representatives (84 Cong. Rec.—issue of May 3, 1939, pp. 7131-7133); H. Rep. No. 1072, 70th Cong., 1st Sess.; H. Rep. No. 1100, 70th Cong., 1st Sess.

<sup>9</sup> \$5,000 was then appropriated to ascertain the most practicable methods of improving its navigation. Act of April 14, 1820, c. 44, 3 Stat. 562.

of coordination of local efforts, it created the Mississippi River Commission, which took over that task. Act of June 28, 1879, c. 43, 21 Stat. 37. The Eads plan, adopted in 1881, relied upon levees only; the plan was to confine the river within levees and thus to produce an automatic deepening of the channel by the action of the water. Gradually, by 1917, Federal participation in flood control was the uniform policy; it was, however, conditioned upon local contribution of substantial percentages of the cost of construction, maintenance and repair of levees. Act of March 1, 1917, c. 144, 39 Stat. 948.

The Mississippi River Commission, from its inception, followed the policy of "levees only",<sup>10</sup> and under that policy an enormous system of levees was constructed up and down the Mississippi River and its tributaries. Yet other policies were recognized as possible. Cut-offs, reservoirs, reforestation, and many other plans were considered from time to time, and rejected.<sup>11</sup>

In 1927 occurred the most disastrous flood on the Mississippi River in recorded history. Devastation was general in the entire valley. Almost at once came a demand for a radical change in methods of flood control. The Committee on Flood Control of the House of Representatives began hearings on

<sup>10</sup> H. Rep. No. 1072, 70th Cong., 1st Sess., p. 83.

<sup>11</sup> *Id.*; also Tyler statement, *supra*, note 8, at 7132.



November 7, 1927, and sat for over three months.<sup>12</sup> The Committee on Commerce of the Senate likewise held hearings from January 23, 1928, to February 24, 1928.<sup>13</sup> Several hundred plans—feasible and fantastic—were submitted, and at least twenty bills. The conclusions reached were that the “levees only” system of the Mississippi River Commission was inadequate, and that spillways, diversion channels, reservoirs, and the like, should also be included in any comprehensive system. The culmination was the Flood Control Act of May 15, 1928 (*infra*, pp. 79–88).

Eight years later, further extensions and modifications were made in the 1928 plan. In 1935 and 1936 extended hearings were held before both Senate and House committees.<sup>14</sup> By the Act of June 15, 1936 (c. 548, 49 Stat. 1508), the 1928 Act was largely modified in accordance with further recommendations of the Chief of Engineers. Reservoirs, for example, which had played but a minor part in the Jadwin Plan, obtained far larger importance. And among other specific modifications of the Jadwin Plan, the projected Boeuf

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<sup>12</sup> See H. Rep. Hearings on Flood Control, H. Comm. on Flood Control, 70th Cong., 1st Sess., 7 Vol.

<sup>13</sup> See S. Hearings on Flood Control, S. Comm. on Commerce, 70th Cong., 1st Sess.

<sup>14</sup> See e. g., S. Hearings on Flood Control in the Mississippi Valley. S. Comm. on Commerce, 74th Cong., 2d Sess., on S. 3531 (Jan. 27–30, 1936); Hearings H. Comm. on Flood Control, 74th Cong., 2d Sess., on S. 3531 (Apr. 30 and May 1, 1936).

Floodway was authorized to be abandoned, and a new projected Eudora floodway was to be substituted for it.

There will, in other words, always be changes and improvements. No man has yet dared to assert that *the* plan for Mississippi flood control has been found—the plan which cannot be improved and will not be modified. Until a plan has gotten beyond the project stage—until there has been at least an actual interference with any particular land—Congress must have freedom to make the necessary changes.

Here respondent claims but \$4,000 (R. 16). Respondent, however, owns but 40 acres, and the bed of the projected Boeuf floodway is over 125 miles long and 15 miles wide. See *Hurley v. Kincaid*, 285 U. S. 95, 100. There are already pending in the District Court for the Eastern District of Arkansas eleven other cases representing claims of over \$100,000, and there are in the Court of Claims more than fifty cases representing claims of several million dollars, all based upon the same ground as the present action (R. 217-219). We submit that the Fifth Amendment to the Constitution should not be so construed as to require the United States to pay these claims, and probably many million dollars more, as the price of its conclusion in 1936 that the Boeuf project, which was deemed sound in 1928, but which was never begun, should be replaced with a better, Eudora, project; nor

should the Amendment be so construed as to make the cost of Federal participation so tremendous that it would have to be curtailed radically or even completely abandoned.

We believe that on the facts as shown by the record in the present case no taking has occurred, and that the United States has not become liable to respondent. We shall show, first, that there has been no taking within the meaning of the Fifth Amendment, and second, that there is no greater liability imposed upon the United States by statute.

## II

### THERE HAS BEEN NO TAKING OF RESPONDENT'S PROPERTY WITHIN THE MEANING OF THE FIFTH AMENDMENT

#### *A. The Facts Show Added Protection to the Land, and That the Boeuf Floodway Project Has Been Abandoned*

The basic facts here involved are contained in the findings of the District Court (R. 350-366, 389), made after a protracted trial. Those findings, if supported by substantial evidence, are, of course, conclusive upon the parties and have the same effect as the verdict of a jury.<sup>15</sup> *Wessel v. United*

<sup>15</sup> Notice of appeal was filed on November 29, 1937 (R. 96). The case was, therefore, pending in the appellate court when the Federal Rules of Civil Procedure became effective. Rule 52 is, therefore, inapplicable. See *McCrone v. United*

*States*, 49 F. (2d) 137, 139 (C. C. A. 8th). When two different conclusions of fact may reasonably be drawn from uncontroverted evidence, an appellate court will not disturb the trial court's determination of the inferences to be drawn. *United States v. Gamble-Skogmo*, 91 F. (2d) 372, 374 (C. C. A. 8th). See also *Brothers v. United States*, 250 U. S. 88, 93; *Crocker v. United States*, 240 U. S. 74, 78; *United States v. N. Y. Indians*, 173 U. S. 464, 470; *Chase v. United States*, 155 U. S. 489, 500; *F. T. Dooley Lumber Co. v. United States*, 63 F. (2d) 384 (C. C. A. 3th); and *Hearst Radio v. Good*, 91 F. (2d) 555 (App. D. C.).

There is no dispute concerning the location or character of the respondent's land. It lies in the Boeuf Basin, which has always been a natural floodway of the Mississippi River (R. 354, 356, 357). It has been repeatedly overflowed by deep, high water, especially in the floods of 1912, 1913, 1919, 1921, 1922, and 1927, and has never been entirely immune from overflow, despite the construction of strong levees (R. 357-358, 362). In fact, any land lying immediately behind levees along the main stem of the Mississippi River is subject to extreme hazards at all flood stages, since there never can be assurance against the breaking and crevassing of levees by floodwater, regardless of their height and strength (R. 363).

*States*, 207 U. S. 61, 65; statement of William D. Mitchell, Chairman of the Advisory Committee, Cleveland Proceedings of the American Bar Institute, p. 379.

Nor is there dispute as to the acts of the United States. On May 15, 1928, by the Flood Control Act, Congress adopted the general engineering features of the Jadwin Plan, although it left many of its details to be settled by decision of the President. Section 1. *infra*, p. 79. On August 8, 1928, the Mississippi River Flood Control Board, acting pursuant to Section 1 of the Act, reported to the President who approved its general recommendations on August 13, 1928, and on January 10, 1929, approved its recommendation that guide levees be constructed in the Boeuf floodway, and that rights-of-way be acquired for them (R. 379). On July 1, 1929, a suit was begun by the United States to condemn certain lands, other than those involved here, for rights-of-way for these guide levees, and an injunction issued against interference with the agents of the United States in taking possession of such lands (R. 129-130). No further proceedings were had, and on December 18, 1934, the suit was dismissed upon the motion of the United States Attorney (R. 130).

Work was begun on the general flood-control program in 1928, and has been continued to the present. The Boeuf Floodway project, however, was never begun (R. 358). The guide levees were never definitely located (R. 356), and nothing was ever done toward their construction (R. 359). On August 11, 1934, when the present suit was filed, some of the other work had been done on the "middle section" (R. 379). The riverside levee on the east bank of the Mississippi River and a part of



the levee on the west bank had been raised 3 feet (R. 379). A section of approximately 60 miles on the west bank remained unchanged, at the 1914 grade; this section included the part which had been projected as the Boeuf fuse-plug levee, but also included some 28 miles not so projected (R. 357). (See Comm. Doc. No. 1, H. Comm. on Flood Control, 74th Cong., 1st Sess., p. 4; R. 142-143.) By the Act of June 15, 1936, *infra*, p. 89, Congress directed abandonment of the Boeuf Floodway project, and authorized another floodway—the Eudora Floodway—to be constructed in its place. The Boeuf Floodway is no longer considered a part of the navigation and flood-control plan (R. 361).

Finally, the findings are clear as to the effect upon the respondent's land of the conduct of the United States. It is undisputed that the United States has not interfered, in any way, with respondent's use, possession and control of her land, nor has any drainage system been affected (R. 364, 365). No act on the part of the United States or its officers resulted in the diversion of any flood waters into the proposed floodway or upon the respondent's land. No additional servitude has been placed upon it (R. 365). Since 1927, no water has reached the land (*id.*) Its physical situation remains unchanged. The work done in other localities pursuant to the Act has in no way changed or reduced the levee protection of her property (R.

366)—the levee remains at its original grade, and affords to the land at least the same protection that it has always had (*id.*) Indeed, this protection has been increased by the strengthening of the levees on the south bank of the Arkansas River (R. 362), and by the construction of cut-offs and channel stabilization in the Mississippi River, which had appreciably lowered the flood level of the river, with the result that despite great floods in 1929, 1935, and 1937 (R. 365), the land was not inundated. (R. 360-362, 365). And, although the evidence was in dispute, the District Court found on substantial evidence that any decrease in the value of the respondent's land since 1928 has not been due to the passage of the Act or to any action on the part of the United States pursuant thereto, but has been largely due to extraneous factors (R. 364) such as the general depression (R. 215), the low price of cotton (R. 213, 220, 222), burdensome taxes (R. 220, 221, 223), and the flood of 1927 (R. 229).<sup>16</sup>

On these facts, we submit that the conclusion of the District Court that there had been no taking was plainly correct. The land is subject to no addi-

<sup>16</sup> The Southeast Arkansas Levee District, where the respondent's land is situated, was overflowed, in 1927, by 15 to 20 feet of water which "swept from the cleared lands every vestige of improvement and practically wiped out of existence Arkansas City" (H. Rep. No. 1072, 70th Cong., 1st Sess., p. 275). The District, with an assessed valuation of \$12,500,000 (*id.*, p. 41), suffered a property loss of over eleven million dollars (*id.*, p. 275).

tional flood danger; indeed, it is better protected than ever before. The floodway project which is supposed to amount to a taking has been abandoned.

The scope of respondent's claim may best be illustrated by supposing the not improbable contingency of another change in flood-control plans for the Tensas Basin. If the Government were to decide, on the experience of the last decade, that the straightening and deepening of the channel between the Arkansas and Red Rivers was itself sufficient protection, it is not unlikely that the Cypress Creek fuse-plug levee would be raised to the height of the other levees. There would, under those circumstances, be no conceivable basis for a claim that respondent's flowage rights had been taken. Yet, if the decision below were affirmed, she would already have received payment for a hypothetical taking which would never have materialized under the original plans, which was supposed to arise under a plan which had been abandoned, and which was contradicted by the plans actually put into effect. As the flood-control plans now stand, the decision below requires the United States to pay compensation to landowners who are now better protected than before; under possible future modifications of plans, the decision below becomes even more extraordinary, for the Government would have paid for perpetual flowage rights on a basis which was hypothetical at the time of suit and specifically contradicted by subsequent action.

To hold the Government liable for flowage rights, when the lands have not once been flooded since 1928, would be a travesty on the principle of "just compensation." In the 15 years from 1912 to 1927 the lands were six times flooded; in the 12 years from 1928 to 1939 the lands have not once been flooded, although the period included the three great floods of 1929, 1935, and 1937.

The Fifth Amendment is designed to protect against the uncompensated seizure of private property. It is not a penal clause designed to discourage governmental benefits to property. A landowner who is in fact benefitted cannot urge that his land has been taken because of conjectural fears which once arose under a project since abandoned.

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While it is difficult to state precisely the basis for the contrary conclusion of the majority of the court below, apparently it proceeded upon the following assumptions: (1) That the flooding of respondent's land had become a "fixed fact" instead of, as formerly, a "casual and incidental happening" (R. 416); (2) that the Boeuf floodway was substantially completed and in operative condition (R. 418-419); and (3) that Congress has deprived the respondent of her right of flood-fight by assuming exclusive jurisdiction over the levee (R. 416, 420).

The respondent's contention, as summarized by both courts below (R. 387, 413) is that a taking was effected by the following: (1) The passage of

the Act of May 15, 1928; (2) the approval, by the President, on January 10, 1929, of the construction of guide levees in the Boeuf Basin; (3) assumption of control over the levee to the exclusion of respondent's right of "self-defense"; and (4) the acts of the Government in raising the levee above, below, and across the river from the levee protecting respondent's land, which is retained at the 1914 grade. The respondent also contended below that additional factors proving a taking were: The proclamation of the President of August 13, 1928, approving the "policy and method" of dealing with flood control, set forth in the report of the Mississippi River Flood Control Board (R. 128); the condemnation suit filed on July 1, 1929, described *supra*, pp. 8-9 (R. 129); and an injunction issued on that date in connection with that suit (R. 129-130). The date of the alleged taking was fixed at January 10, 1929 "or thereabout" (R. 239).

We will discuss the various acts of the United States or its agents, upon which the respondent or the court below relied, in chronological order.

*B. The Passage of the 1928 Act, the Proclamations of the President, and the Condemnation Suit*

1. The Act of May 15, 1928, *infra*, p. 79, "adopted and authorized" the engineering plan set out in the Jadwin Report, but at the same time directed the creation of a special board to report to the President on the differences between the Jadwin Report



and the Report of the Mississippi River Commission of November 28, 1927. The Board reported on August 8, 1928, recommending adoption of the Jadwin Plan. Comm. Doc. No. 28, H. Comm. on Flood Control, 70th Cong., 2d Sess. The President on August 13, 1928, approved the report of the Board; on January 10, 1929, he specifically approved construction of the guide levees in the Boeuf River basin (R. 379; H. Comm. Doc. No. 2, H. Comm. on Flood Control, 71st Cong., 1st Sess.).

On July 1, 1929, the United States filed suit to condemn land to be used for the guide levees in the Boeuf River basin; on the same day the District Court authorized entry by the United States and enjoined any interference with its taking possession (R. 129-130). However, due to local opposition and the injunction obtained in *Kincaid v. United States*, 35 F. (2d) 235, 37 F. (2d) 602 (W. D. La.), 49 F. (2d) 768 (C. C. A. 5th), reversed, *Hurley v. Kincaid*, 285 U. S. 95, construction was never begun. On December 18, 1934, the condemnation suit was dismissed on motion of the United States (R. 130).

2. We submit that under the decisions of this Court it is plain that no "taking" was accomplished by the passage of the statute, by the Presidential proclamations or by the condemnation suit.

In *Wilink v. United States*, 240 U. S. 572, the Court was called upon to decide whether the adoption of a plan constituted a taking. The decision here follows *a fortiori* from that ruling. A harbor

line had been extended by the Secretary of War to include a portion of plaintiff's land. Congress had approved the project, had appropriated a sum of money to pay damages for the removal of the land, and a contract for that purpose was let. When the plaintiff wanted to rebuild his wharf he was prevented from doing so by the Government and ordered to remove the piling. Nothing tangible, however, to carry out the contract or to enforce the order was done, and eight years later the harbor line was changed again, this time omitting the plaintiff's land. The Court held (pp. 579-580):

There was no actual taking of any of the claimant's property, nor any invasion or occupation of any of his land. \* \* \*

Something more than the location of a harbor line across the land was required to take it from him and appropriate it to public use.

\* \* \* No taking resulted from the request that he remove his facilities, for it was neither acceded to nor enforced. And the contract for cutting away a part of the land was also without effect, because there was no attempt at performance.

Again in *Bauman v. Ross*, 167 U. S. 548, this Court had before it a statute which provided that upon recordation of a map detailing plans of the Commissioners of the District of Columbia for the extension of a permanent system of highways; no further subdivision of land included in the area would be permitted, except in accordance with the

plan. Owners of property affected claimed that the recording of such a map, pursuant to the statute, effected a taking of their land. This Court did not agree, and held that the recording of a map does not restrict in any way the use or improvement of the land by its owners, prior to the actual taking, by condemnation or otherwise, of the land for highway purposes. See also *Shoemaker v. United States*, 147 U. S. 282; *Garrison v. City of New York*, 21 Wall. 196, 204; *Smith v. United States*, 32 C. Cls. 295, 309-311; *United States v. Holden*, 268 Fed. 223 (N. D. N. Y.). Cf. *Marion & Co. Ry. Valley R. Co. v. United States*, 270 U. S. 280.

The respondent relied below upon *Hurley v. Kincaid*, 285 U. S. 95, as authority that a taking occurred when the Government commenced work on the project. That case clearly is not authority upon the point. There Kincaid sought to enjoin work on the Boeuf Floodway, contending that since his land, which was located in the proposed floodway, had not been condemned, the construction of the floodway would deprive him of his property without just compensation. Kincaid contended that there had been a taking and the Court stated (p. 103):

We have no occasion to determine any of the controverted issues of fact or any of the propositions of substantive law which have been argued. \* \* \* *We may assume that, as charged, the mere adoption by Congress of a plan of flood control which involves an intentional, additional, occasional flooding of complainant's land constitutes a taking of*

it—as soon as the Government begins to carry out the project authorized. \* \* \*

[Italics supplied.]

Clearly, this was the familiar practice of assuming the postulate most favorable to the party seeking relief for the purpose of showing that, even such under an assumption, he was not entitled to the relief. The holding of the Court was that Kincaid was not entitled to an injunction, because, even on that assumption, he had an adequate and complete remedy at law by a suit under the Tucker Act to recover just compensation. Indeed, the Court replied (p. 104), to the contention that the officers threatened to start work without acquiring flowage rights, that “the Fifth Amendment does not entitle him to be paid in advance of the taking.”

So far as the passage of the 1928 Act and the Presidential proclamations approving the project as well as the plan to acquire the rights-of-way for the guide levees are concerned, *Willink v. United States* and *Bauman v. Ross* are conclusive.<sup>17</sup> And

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<sup>17</sup> The court below apparently attached some importance, as rendering the project “fixed” (R. 412), to an opinion of the Attorney General (36 Op. Atty. Gen. 80) given in answer to an inquiry by the Secretary of War. This opinion did no more than instruct the Secretary that the acceptance by Congress of the engineering plan of the Jadwin Report barred any deviations from the plan. The Attorney General expressly declined to render any opinion concerning the acquisition of flowage rights, for the reason that the question was then before the courts. This was in accord with the apparent intent of Congress, for in the debate of the bill in

the *Willink* case is equally conclusive as to the irrelevance of the condemnation suit, which was later dismissed. That suit, it should be observed, was intended to procure for the United States land to be used for guide levee rights-of-way (R. 129). Respondent does not claim that her land lies in any right-of-way for levees, nor that it has been interfered with in any way. The suit, in other words, even if respondent had been the owner of the lands sought to be condemned, is comparable to the contract in the *Willink* case—action looking to the carrying out of the plan, but entirely without effect because never pressed to the extent of an actual interference.<sup>18</sup> Cf. *In Re Condemnations for Improvement of Rouge River*, 266 Fed. 105, 115 (E. D. Mich.); *Marion Etc. Ry. v. United States*, *supra*. Here, when respondent's land was not the object of the suit, and was not affected by the suit in the slightest degree, plainly no claim of a taking can rest upon it.

the Senate, Mr. Jones, author and sponsor of the Flood Control Act, stated, with respect to General Jadwin's contention that the land was subject to a natural flowage right in the United States, that "there would be a question there for the courts to determine" (69 Cong. Rec. 5486).

<sup>18</sup> Compare the power of the Government to dismiss condemnation suits without liability for just compensation, or to abandon a taking before possession has become permanent. *Bauman v. Ross*, *supra*, 598-599; *Owen v. United States*, 8 F. (2d) 992 (C. C. A. 5th); *Commercial Station Post Office v. United States*, 48 F. (2d) 183 (C. C. A. 8th).



### *C. Alleged Assumption of Control Over the Riverside Levee*

The respondent also urges that the 1928 Act constituted a taking of her property because under it the United States purportedly assumed such control over the riverside levees as to deprive her of her right of flood-fight, or self-defense against floods by raising the height of the riverside levee. And in *Danforth v. United States*, 105 F. (2d) 318, decided by the Circuit Court of Appeals for the Eighth Circuit subsequent to the present case, with a different panel of judges sitting, the Court distinguished the present case from that then before it on the ground that in the present case the United States had assumed this control over the riverside levee. It is submitted that the contention that the United States has assumed control of the riverside levee, and the further contention that such an assumption of control would constitute a taking of property, are both without merit.

1. Nothing in the Act indicates an assumption of such control. The provisions of Section 14 of the Act of March 3, 1899 (c. 425, 30 Stat. 1152; U. S. C., Title 33, Sec. 408), which forbid interference with levees and other structures and which are made applicable by Section 9 of the 1928 Act, *infra*, p. 85, apply only to levees and other structures built by the United States, and consequently have no application to this levee, which was built by local interests (R. 14-15). A provision specifically giv-

ing to the United States the control which the respondent alleges to exist was in the original bill and was stricken out. See 69 Cong. Rec. 7114-7115.<sup>19</sup>

The District Court concluded that the Act did not restrict respondent's right of flood-fight (R. 388) and pointed out the fact that the property owners had exercised that right in the flood of 1937 (*id.*). The War Department has similarly construed the Act (Comm. Doc. No. 2, H. Comm. on Flood Control, 71st Cong., 1st Sess., R. 252), stating that—

\* \* \* the flood control project has a weak spot with reference to flood control in that there is no law preventing local interests from raising the so-called fuse plug levee at the heads of the Atchafalaya and Boeuf Basins. These interests have not been deprived by the United States of protecting themselves. \* \* \*

The conclusion of the court below to the contrary (R. 416) is, we submit, erroneous.

2. But, in any event, assumption of control of the levee by Congress would not subject the United States to liability. Congress has legislated and undertaken construction for the control of floods in the interest of navigation and commerce, as well

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<sup>19</sup> The necessity of such control had been emphasized in Section 420 of the Jadwin Plan. The court below seems to have assumed that it thereby became law when the Jadwin Plan was approved by the 1928 Act (R. 416). Plainly, however, Congressional approval was limited to "the engineering plan" of the Jadwin Report. See Sec. 1, *infra*, p. 79.

as in the interest of the general welfare of the entire United States. It has been held that under those powers the United States has the authority, without liability, to fix the height at which levees may be constructed. In *Matthews v. United States*, 87 C. Cls. 662, the Court of Claims held (p. 718):

The United States had the right, without liability, in the exercise of its lawful authority to control navigation and navigable waters, to fix the height at which the river-side levee might be constructed—namely, at 58 feet, and plaintiff cannot sustain a taking because of this feature of the Flood Control Act \* \* \*.

The same holding is implicit in the decisions of this Court in *Jackson v. United States*, 230 U. S. 1; and *Hughes v. United States*, 230 U. S. 24. In both of them the United States had by levee construction subjected the plaintiff's land to increased flooding, and that in both cases this was held not to constitute a taking. While it does not appear in either case that the United States had forbidden the plaintiffs to construct levees for their protection against the increased floods caused by the United States, it is plain that had the United States done so it would not have affected the result.<sup>20</sup> It would have been utterly impractical, both from the stand-

<sup>20</sup> Cases in which self-protection by the landowners, or other interested parties would wholly have thwarted the purpose of the Federal construction, but in which they were

point of costs and of engineering, for the land-owners to have constructed levees to protect themselves from the higher waters caused by the United States,<sup>21</sup> and it is not reasonable to assume that the Court denied them relief because of the supposed existence of a right of self-protection which, it was obvious, could not have been used.

Moreover, as we have shown, even if the height of the levees had unalterably been fixed by the Act, respondent's land yet has even greater flood protection than before. The Fifth Amendment requires just compensation for property taken; it does not require payment for a wholly theoretical injury because of loss of control over levees placed on other land.

*D. The Work Done by the United States Pursuant to the 1928 Act*

Respondent also relies upon the fact that the United States has, since 1929, been proceeding with

denied recovery, include *South Carolina v. Georgia*, 93 U. S. 4; *Gibson v. United States*, 166 U. S. 269, 276; *W. A. Ross Construction Co. v. Yearsley*, 103 F. (2d) 589 (C. C. A. 8th); Compare *Franklin v. United States*, 101 F. (2d) 459 (C. C. A. 6th), pending on certiorari, No. 27, October Term, 1939. And see Section 1, Act of June 22, 1936, c. 688, 49 Stat. 1570.

<sup>21</sup> It clearly so appears from the opinion in the *Jackson* case. See *Jackson v. United States*, 230 U. S. 1, 5-6, 13-14, 22. And the opinion in the *Hughes* case states that the general engineering situation was substantially the same in that case as in the *Jackson* case. See *Hughes v. United States*, 230 U. S. 24, 26 ff.

other navigation and flood-control work on the Mississippi River. Particularly, respondent relies upon the fact that the levees on both the east and west banks of the middle section of the river, except for a stretch of 60 miles on the west side which includes the projected Boeuf fuseplug levee, have been raised three feet above the 1914 level. The 60-mile section remains unchanged at the 1914 grade. We submit that no taking may be predicated upon these facts.

1. *Consequential Injury From Other Work on the River Would Impose No Liability.*—This Court has decided that no right accrues to a landowner when the United States increases the height or strength of the levees upstream and downstream from his land and on the opposite side of the river from his land, and thereby increases the susceptibility of his land to floods. *Jackson v. United States*, 230 U. S. 1. That case involved the “Eads plan” for the improvement of navigation and the control of floods in the Mississippi valley. The Eads plan was adopted by Congress in 1881, and it initiated large-scale Federal levee construction on the Mississippi. It involved the building (or maintenance) of continuous levees along both the west and east banks of the river and its tributaries from Cairo, Illinois, to the mouth of the river, except in stretches where natural ridges approached close to the river and served the purpose of levees. As the Eads plan contemplated the use of the power of the river to cut out a deeper channel, by confining its



waters within its banks, it necessarily involved raising the level of the river. The plaintiffs in the *Jackson* case owned plantations on the east bank of the Mississippi situated in a small basin between the river and a natural ridge. The plaintiffs had constructed levees to protect their plantations. The levees constructed or maintained by the United States under the Eads plan did not, however, include the plaintiff's levees, or any levee to protect their lands, for the reason that the cost of constructing or maintaining such a levee would have amounted to more than the value of the lands lying between the river and the foothills. The levee construction pursuant to the Eads plan, raised the level of the river and caused the levees protecting the plaintiff's lands to be washed away and subjected those lands to increased flooding, both as to frequency and depth. This Court held that upon these facts the United States had not taken the plaintiff's lands. After expressing doubt that the United States could be held solely responsible for the construction works, since the states and local agencies had collaborated with it, the Court held that in any event the United States had not taken the plaintiff's lands. It said (230 U. S. at 20):

it is certain there would be no right on the part of an individual to insist that primitive conditions be suffered to remain and thus all progress and development be rendered impossible.

and (230 U. S. at 23):

\* \* \* the plenary power of the United States to legislate for the benefit of navigation and to construct such works as are appropriate to that end, without liability, for remote or consequential damages, has been so often decided as to cause the subject not to be open.

Compare *Matthews v. United States*, 87 C. Cls. 662; *Bedford v. United States*, 192 U. S. 217, 223-224.<sup>22</sup>

We believe that the *Jackson* case is directly in point, and is decisive.<sup>23</sup> There are other cases, however, which substantiate that conclusion. In *Hughes v. United States*, 230 U. S. 24, the United States had constructed a new levee which, instead of running in front of the plaintiff's property as the old levee had done, ran behind it. The plaintiff contended that the failure of the United States to build the levee as he demanded, in front of his property, subjected him to danger from increased stages of floodwater caused by the construction, by

<sup>22</sup> This rule is not changed, so far as the land here involved is concerned, by the provisions of Section 3 of the 1928 Act, *infra*, p. 83, directing the Secretary of War, when necessary, to acquire floodage rights over lands "which are not now overflowed or damaged." It is undisputed that this land has been repeatedly subjected to overflow and damage in the past.

<sup>23</sup> The *Jackson* case stressed the plenary power of the United States to legislate in the interest of navigation, and to construct such works as are appropriate to that end. As we have pointed out above, p. 16, the same power was being exercised in the instant case.

the United States, of levees elsewhere along the river. The lower court allowed recovery, on the ground that the acts of the United States had, in effect, moved the plaintiff's property into the bed of the river, and had, in any event, imposed an additional servitude on the property by subjecting it to more frequent and more destructive overflows. This Court reversed, pointing out that plaintiff's protection from the old levees remained unchanged, and that the construction of the new levees elsewhere would not serve as a basis for complaint. It rejected the claims of the plaintiff, stating (p. 32) that they—

\* \* \* in their last analysis but involve the assertion of a right of recovery against the United States for failing to build a levee in front of the plantations in question for the purpose of affording them protection from the increased stage of high-water which it was asserted had been created by the act of the United States in building levees elsewhere along the river.

The argument there rejected seems indistinguishable from respondent's argument here. See, also, *Sanguinetti v. United States*, 264 U. S. 146; *Transportation Co. v. Chicago*, 99 U. S. 635, 642; *United States v. Lynah*, 188 U. S. 445, 470-471; *Coleman v. United States*, 181 Fed. 599, 603 (N D. Ala.); *Barr v. Spalding*, 46 F. (2d) 798, 801 (W. D. Ky.); *Marret v. United States*, 82 C. Cls. 1, 14, certiorari denied, 299 U. S. 545.

The *Jackson* and *Hughes* cases have been followed by the Court of Claims and the Circuit Court of Appeals for the Eighth Circuit—the same court which decided the instant case—in cases also arising under the 1928 Act and somewhat similar to that here presented. These cases are *Matthews v. United States*, 87 C. Cls. 662, and *Danforth v. United States*, 105 F. (2d) 318. In each of these cases the plaintiff's land was located in the Bird's Point Floodway, which was to be constructed by the building of a set-back levee some miles to the west of the riverside levee, and the reduction in height of the latter by three feet, so that in times of flood the river would overtop the riverside levee and flow in a much wider channel, part of which would be plaintiff's land. When the suits were instituted the set-back levees had been built, but the riverside levee had not been cut down. The courts denied recovery in both cases. Both courts pointed out that the only injury to which the plaintiff was subjected by the construction up to the time of suit was that the set-back levee would confine upon the plaintiff's land floodwaters which overtopped the riverside levee, and which otherwise would have spread out over adjacent land. Both courts held that there was no taking. Certainly, in the present case, since the floodway has not even been begun, the result must be the same.

2. *The Other Work Has in Fact Increased Respondent's Flood Protection.*—Actually, the posi-

tion of the respondent here is much weaker than that of the plaintiffs in the *Jackson, Hughes, Matthews*, and *Danforth* cases. In those cases the courts were willing to assume that the flood hazard to the plaintiff's lands had been increased. Here, however, the District Court found, on substantial evidence (R. 366; 238, 243), that the work done pursuant to the 1928 Act had in no way reduced the levee protection to respondent's property or increased the flood hazard thereto. Indeed, it found, upon substantial evidence (R. 238, 242, 243-244, 258, 260, 362), that the work of the United States since the 1928 Act in channel stabilization and cut-offs had afforded *additional* protection to respondent's land, and that the building and strengthening of the levées on the south bank of the Arkansas by the Mississippi River Commission, independently of the 1928 Act, had also afforded additional protection (R. 227, 251, 254-255, 362).<sup>24</sup> Taken as a whole, therefore, the activity of the United States in the middle section of the river has not increased, but has substantially decreased, the flood hazard so far as respondent is concerned. While under the cases above cited it would be wholly irrelevant if her land, which has frequently been flooded in the past, has been subjected to some conjectural increased liability to

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<sup>24</sup> It was the breaking of the levees on the south bank of the Arkansas that flooded the Boeuf Basin, including the respondent's land, in 1927 (R. 362).



flooding (see *Sanguinetti v. United States*, 264 U. S. 146, 149), the fact is that here the contrary is the case. It would be strange indeed if liability for a taking could be asserted in these circumstances.<sup>25</sup>

The court below, without directly challenging the indisputable findings that the lands in fact were receiving more protection than before 1928, seems to have reached its result by reliance upon two assumptions, in addition to the factors in its decision which have already been discussed. First, it seems to have assumed that *in fact* the projected Boeuf Floodway was substantially complete and in operative condition at the time the suit was brought (R. 418-419). Second, and apparently alternatively, it seems to have assumed that *in law* the amount of work which had been done upon the projected

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<sup>25</sup> It may be objected that the benefit to respondent's land from the levees on the Arkansas River is irrelevant because it was not done pursuant to the 1928 Act, but under the general authority of the Mississippi River Commission (See R. 362). The premise of the argument could be admitted, since apart from the levees respondent's land was nevertheless given additional protection by the cut-offs and channel stabilization, which were a part of the project contemplated by the Act (R. 362). We believe, however, that when the taking is asserted upon the basis of acts done by the United States rather than upon the basis of a plan alone, see *supra*, pp. 33-38, all acts done by the United States must be considered. It is wholly unrealistic to assert that a taking can occur because certain acts, taken alone, would impose an additional flood hazard upon respondent's land if, when taken together with other and contemporaneous acts directed at the same general end, the flood hazard has in fact been decreased.

Boeuf floodway was irrelevant because of work which had been done elsewhere on the Mississippi River under other parts of the Jadwin Plan. We submit that neither of these assumptions can be sustained.

3. *The Boeuf Floodway was never commenced.*—The District Court found that no work whatever had been done on the projected Boeuf floodway; that the riverside levee remained at the same grade as before; and that the guide levees had not been started or even definitely located (R. 359). Those findings are not, and cannot be disputed. They are completely at odds with the conclusion of the court below that the flooding of respondent's land had become a "fixed fact" instead of, as formerly, "a casual and incidental happening" (R. 416).

(a) The court below sought to avoid the force of these findings by asserting that the guide levees were not necessary features of the project (R. 419). That assertion, we submit, was erroneous. The essential character of the guide levees may be seen from a comparison of the situation of respondent's land with that of other land in the Boeuf Basin but not within the bed of the projected floodway. Respondent will probably admit that no floodage easement has been taken with respect to land of the latter sort. Yet respondent's land differs only in that if the guide levees had been built, it would have been overflowed by the greater volume and depth of water which the guide levees would have prevented

from spreading out over the whole of the Tensas Basin. So far as the present case is concerned, it is unnecessary to discuss whether the United States would be liable if the levees had been built.<sup>26</sup> Here, since the guide levees have not been built, or even begun, no greater burden is imposed upon respondent's land than is imposed upon any other alluvial land in the Tensas Basin.<sup>27</sup> The *Jackson* case is conclusive.

Any contention to the contrary leads to a wholly untenable situation. If the guide levees are immaterial and unnecessary to the project, as the court below assumed (R. 419), because "they would serve merely to limit the quantity of the lands subject to diversion overflow," the Government would seem compelled, if the decision below be good law, to purchase flowage rights over all alluvial land in the Tensas Basin; for even if confining guide levees

<sup>26</sup> As stated *supra*, p. 47, the court below in *Danforth v. United States*, 105 F. (2d) 318, decided subsequently to the present case, and the Court of Claims in *Mattheus v. United States*, 87 C. Cls. 662, held that the increase in the quantity and depth of the water occasioned by guide levees did not amount to a taking.

<sup>27</sup> Furthermore, Section 1 of the Act, *infra*, p. 79, contains the specific direction that "all diversion works and outlets constructed under the provisions of this Act shall be built in a manner and of a character which will fully and amply protect the adjacent lands." This provision was explained by the managers of the bill in the House of Representatives as intended to provide that "diversion works shall be constructed so as to control and confine the volume of water taken from the main channel of the river." 69 Cong. Rec. 8211. The conclusion is compelled, therefore, that the guide levees are essential features.

were eventually to be constructed, all the land outside the floodway could plausibly be argued already to have been taken and the liability of the Government fixed. It cannot be thought that such a result is intended by the Fifth Amendment.

The matter may be stated in terms of degrees. Every improvement in levees which adds protection to any land against floods increases, *pro tanto*, the severity of the floods elsewhere. For example, if the United States were to erect a high ring of levees around Arkansas City, the amount of floodwater which would flow over respondent's land in time of flood would be increased, although in slight degree, and the same effect would occur, to a greater or lesser degree, the whole distance down the river. Certainly, however, the United States would not be required to pay for floodage easements because of that effect. That is the most extreme situation. The *Jackson* case carried it a step further. There additional high levees on the opposite side of the river, and upstream on the same side of the river, resulted inevitably in increasing the amount of water which in a flood would flow over the plaintiff's land, and also in increasing the probability that a crevassing would occur in the levee protecting the plaintiff's land. There, too, the increased likelihood of flooding was held insufficient to subject the United States to liability. That decision goes beyond the present case, for here the land is in fact receiving greater

flood protection than before. Finally, had the floodway been completed, the question would have been still different. Then a relatively narrow strip of land would be converted into a floodway to protect other land, some of it immediately adjacent. Whether, in that situation, the servient land would be entitled to claim compensation for the sacrifices is a perhaps more difficult question, and one which turns on the factual increase in flood hazard. It is, however, a question which the present case does not present.<sup>25</sup>

(b) It may, moreover, be noted that the conclusion of the court below that the Boeuf Floodway was substantially complete assumes that a completed fuse-plug levee exists. The District Court found, as we have already stated, that the levee had been left at its original 1914 grade for a distance of 60 miles on the west side of the river from Yancopin to Vau-

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<sup>25</sup> It should also be pointed out that the conclusions of the court below that guide levees are "immaterial details" (R. 418) is inconsistent with its further conclusion that the projected Boeuf Floodway has not been abandoned under the Act of June 15, 1936, *infra*, p. 89, because the Eudora Floodway is not in operative condition (R. 419). The only difference between the two floodways is the area subject to overflow. That area is determined by guide levees, since the projected point of entry for the floodwaters is practically the same in each instance. Therefore, if the Boeuf Floodway was complete without guide levees, so was the Eudora Floodway, on the date when the act authorizing it was approved. The conclusion as to the Eudora Floodway is patently untenable, but is inevitable if the court below was correct.



cluse (R. 379) instead of for only 30 miles from Rohwer to Luna Landing, as contemplated by the Jadwin Plan. Physically, therefore, the riverside levee, retained at its original grade, bore little resemblance to the fuseplug which was planned.

But the existence of a fuse plug is not solely a matter of physical fact. If it were, any section of the levees on a river which was lower than other sections could be called a fuse-plug, and, apparently, under the decision below, could be used as a basis for a claim of taking of floodage rights over lands behind it. A fuse-plug, rather, is a section of the levee which is *intended* to be overtopped by water at a flood stage. H. Rep. No. 1072, Comm. on Flood Control, 70th Cong., 1st Sess., pp. 371, 372. It is the purpose for which it is to be used, not merely the physical characteristic as a lower levee, which creates a "fuse-plug."

Until the guide levees are completed, there is no purpose to have the floodwaters go over the fuse-plug. The fact that the unraised levee is some 27 miles longer than the contemplated fuse-plug (R. 357) indicates that there is no present purpose to divert floodwaters. Compare Section 1 of the 1928 Act, which provides that "pending *completion* of the floodway" the land within it—

shall be given the same degree of protection as is afforded by levees on the west side of the river contiguous to the levee at the head of said floodway.

We submit, therefore, that in the absence of the completed and confined fuse-plug levee, or the guide levees, or, for that matter, either of the two, the court below erred in asserting that the projected Boeuf Floodway was in operative condition.

4. *The other work on the river does not in law mean that respondent's land is taken.*—

The court below also seems to have taken the position that notwithstanding the facts with reference to the projected Boeuf Floodway, the United States was none the less liable because it had done other work on the Jadwin Plan elsewhere on the river. On that basis, for example, it sought to distinguish *Jackson v. United States*, 230 U. S. 1, *supra*, pp. 43-44 (R. 420). Here we believe that it again fell into error.

The District Court made a finding on this issue as well. It found that the projected Boeuf floodway was a separate and independent project (R. 358). That finding was simply ignored by the court below. On the contrary, it seems to have believed that the whole Jadwin Plan must be taken as a unit, with the consequence that because the whole plan was 80 per cent complete, at the time suit was begun (R. 418), the United States had taken the floodage easements even in the incomplete parts. That, we believe, can not be the law.

<sup>29</sup> The subsequent decision of the court below in *Danforth v. United States*, 105 F. (2d) 318, discussed, *supra*, p. 47, is inconsistent with its apparent stand on this point in the instant case, since in the *Danforth* case it held that no

Accepted literally, the conclusion of the court below means that the United States would have taken an easement of flooding over respondent's land even if its work under the 1928 Act had been confined to the strengthening of levees hundreds of miles below the Boeuf project—work which would not have affected respondent's land at all, or if its work had been confined to the cut-offs and channel stabilization in the middle section of the river—work which gave greater protection to respondent's land. Probably the court would not have been willing to go so far. But even if the court meant that the taking occurred because, pursuant to a plan, the levees were raised at certain points in the middle section of the river, we submit that its conclusion can not be accepted.

As we have seen above (pp. 33-39) no taking occurs simply because of the adoption of a plan. And also, as we have seen (pp. 50-55), no work was done on the projected Boeuf project itself. Consequently, the court's position necessarily means that the acts of the United States, which would subject it to no liability, if the Boeuf project had, for example, been suggested and adopted subsequent to the main Jadwin Plan, or as a separate undertaking, subject it to that liability when it is incorporated in the general plan.

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flowage easement had yet been taken with respect to land in the Bird's Point-New Madrid floodway, although that floodway was likewise part of the Jadwin Plan. *Matthews v. United States*, 87 C. Cls. 662, is similarly contrary to the decision below in the present case upon this point.

So stated, we believe that the argument is directly contrary to *Willink v. United States*, 240 U. S. 572, *supra*, p. 34. There, too, a plan existed. There too acts were done pursuant to the plan—the passage of an appropriation act, the letting of a contract, the interference with the structures on the land below the high-water mark. But there the Court denied liability because the upland, for which compensation was sought, had been subjected to no interference.

The Constitution, in other words, adopts no deterministic doctrine that a plan to take crystallizes, or becomes equivalent in law to a completed taking, when the first shovelful of earth is turned. There must at least be work on the project which constitutes an actual interference with the landowner's property rights."

Moreover, the rule adopted by the court below is, as a practical matter, absurd. Liability is made to rest upon the fact that a general plan is enacted. Presumably, liability could be avoided by consider-

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<sup>20</sup> Conceivably, the work could be such that it would make the interference inevitable, even though the acts themselves did not constitute an interference. Completion of a dam which would, in five years, back up water onto a plaintiff's land, might, for example, be a taking even before the water reached that land. Compare *High Bridge Lumber Co. v. United States*, 69 Fed. 320 (C. C. A., 6th) and *Union Electric Light & Power Co. v. Snyder Estate Co.*, 65 F. (2d) 297 (C. C. A., 8th); with *United States v. Chicago, B. & Q. R. Co.*, 90 F. (2d) 161 (C. C. A., 7th) (1937), certiorari denied 302 U. S. 714.

ing each flood-control device and project separately, and examination of the Jadwin Report will reveal that each project was dealt with separately. But, certainly Congress is not to be held to have incurred the tremendous burden of liability which the decision below suggests or declares simply because it adopted the obviously sensible device of considering the various projects in relation to each other. A decision placed on such a ground would seem to drive Congress into a policy by which its flood-control program would be enacted in fragmentary bits, integrated only by accident or tacit design.

5. *Respondent's Apprehension Is Not a Government Taking.*—Respondent does not assert that her land has been interfered with or flooded. The trial court has found that her present protection is better than before 1928. Her position, in essence, is that if there is a flood of sufficient proportions, then her land will more certainly be flooded than that protected by the raised levees, or (contrary to fact) more certainly than was the case before the 1928 Act. In other words the taking for which suit is now brought is supposed to be accomplished simply because of respondent's apprehension of a future taking.

Such an apprehension does not warrant the recovery of compensation. *Peabody v. United States*, 231 U. S. 530; *Court of Marion County, W. Va. v. United States*, 53 C. Cls. 120, 150-151; *Kirk v. Good*, 13 F. Supp. 1020, 1021 (E. D. Mo.); *High*



*Bridge Lumber Co. v. United States*, 69 Fed. 320 (C. C. A., 6th). Here, there was no more than that. As was pointed out above (p. 54), by express mandate of Congress the land of the respondent was to retain protection equal to other land on that side of the river but not in the floodway, until the floodway was complete.<sup>31</sup> That protection has been given, and, indeed, is protection greater than the land possessed prior to 1928. Here, therefore, the work done did not interfere with the respondent's land, any more than with the nearby lands for which the Jadwin Plan could not create even an apprehension of future taking. Consequently, under the doctrines of the *Willink* and other cases cited above, no taking has yet occurred.

Our position is reinforced by the decisions of this Court in a group of three cases involving a gun emplacement at Portsmouth, New Hampshire. *Peabody v. United States*, 231 U. S. 530, is the first case in this series. A battery and fort had been constructed in Portsmouth Harbor. In 1902 two of the guns in the battery were fired over the plaintiff's land, on two different occasions. The land admittedly lay within the most suitable line of fire.

<sup>31</sup> In view of the Congressional mandate, any attempt by respondent to prove that it had been violated would necessarily only be proof that the officers of the United States were acting in excess of their authority. In that event no liability can be asserted against the United States under the Fifth Amendment. *Hughes v. United States*, *supra*; *Hooe v. United States*, 218 U. S. 322; *Mitchell v. Harmony*, 13 How. 115; *Lougherty v. Galliher*, 26 F. (2d) 538 (App. D. C.).

It was conceded that the apprehension of firing caused material depreciation of the value of the land and of the improvements on it, since the property was operated as a resort. The plaintiff's counsel there argued (p. 533) that "It cannot possibly be said that with this menace constantly threatening the claimants' land, materially and permanently impairing its value, their rights of use, exclusion and disposition, have not been so seriously interfered with as to constitute a taking." This Court did not agree. In its decision rejecting the claim, it stated (p. 540):

Reduced to the last analysis, the claim of the petitioners rests upon the fact that the guns were fired upon two occasions in 1902, as stated, and upon the apprehension that the firing will be repeated. That there is any intention to repeat it does not appear but rather is negatived. There is no showing that the guns will ever be fired unless in necessary defense in time of war. We deem the facts found to be too slender a basis for a decision that the property of the claimants has been actually appropriated and that the Government has thus impliedly agreed to pay for it.

Six years later, in 1919, the plaintiff in the *Peabody* case once more came before this Court, complaining of "occasional subsequent acts of gunfire," and the Court saw no occasion to change its view. *Portsmouth Harbor Land & Hotel Company v. United*

*States*, 250 U. S. 1. In 1928 this controversy was finally resolved. The old battery had been dismantled and new, long-range coast defense guns were installed. A fire control was established. The guns were fired. The petition, the allegations of which had been admitted by demurrer, ascribed to the United States the intent to continue to fire the guns. This Court held (*Portsmouth Co. v. United States*, 260 U. S. 327, 330):

The repetition of those acts through many years and the establishment of the fire control may be found to show an abiding purpose to fire when the United States sees fit, even if not frequently, or they may be explained as still only occasional torts. That is for the Court of Claims when the evidence is heard.

On a remand to the Court of Claims for a determination of whether there was an "abiding purpose" to fire the guns, the petition was dismissed, 64 C. Cls. 572, and certiorari was denied, 277 U. S. 603.

The present case is an *a fortiori* one. In those cases it was held that no taking had occurred even though there had been some actual interference and much actual harm. Here, to the present time, there has been no interference and no harm, but rather benefit, from the action of the United States. In those cases, too, the Court held that no taking could occur until an "abiding purpose" to assume the dominion over the land could be proved, and it was not proved even by actual trespasses. Here,

on the contrary, Congress has expressly stated in Section 1 of the Act that it does *not* have any purpose to interfere with respondent's land until the floodway is completed, and, moreover, by the 1936 Act has expressly abandoned the whole project. Apprehension itself cannot constitute a taking if apprehension and trespasses taken together do not.

### III

#### SECTION 4 OF THE 1928 ACT DOES NOT CREATE ANY ADDITIONAL LIABILITY ON THE PART OF THE UNITED STATES

The court below seems to have based its decision upon the provisions of the Fifth Amendment, rather than upon the Act of May 15, 1928. It did refer to Section 4, however (R. 412, 420), and respondent apparently relies upon it. We believe that it does not in any way affect the liability of the United States in the present case.

#### A. *Section 4 Is Merely a Direction to Federal Officers*

Section 4 (*infra*, p. 83) provides in part:

The United States shall provide flowage rights for additional destructive floodwaters that will pass by reason of diversions from the main channel of the Mississippi River:

\* \* \* The Secretary of War may cause proceedings to be instituted for the acquirement by condemnation of any lands, easements, or rights-of-way which, in the opinion of the Secretary of War and of the

Chief of Engineers, are needed in carrying out this project, \* \* \*

The section does not purport either to create any liability or to authorize suits against the United States. It is plainly nothing more than a direction to the officers of the United States to acquire such flowage rights or easements as they may deem necessary before any "additional destructive floodwaters \* \* \* pass by reason of diversions." If, indeed, it be construed to create a liability beyond that implied by the Constitution, Section 4 would seem to be in irreconcilable conflict with Section 3, which provides that "no liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place."

If Section 4 were intended to *create* a liability in the United States, quite different language would have been used. (a) It would doubtless have stated expressly that the United States should be liable for the damage. (b) It would have described with particularity the type of injury or apprehension which was not protected under the Fifth Amendment but which was intended to be compensated under the Act. (c) It would, one supposes, have fixed some measure of the new liability, since the amount of the compensation would, by definition, not be fixed by prior practice or decisions.

Instead, the section speaks merely of "flowage rights for additional destructive floodwaters."



The terseness of the language indicates a reference to a well-understood concept, the just compensation provided by the Constitution for property permanently acquired or interfered with by the Government. That liability, it is true, would have existed without Section 4. But this by no means implies that the section was meaningless.

The United States could acquire the flowage rights either by condemnation or by first taking them and subsequently meeting its liability to the owners. Section 4 was plainly intended to control this discretion which otherwise would have existed in the officers: if the plans called for a taking of the flowage rights, they must be provided before the floodways are put into operation.

The legislative history is discussed in more detail below. It is sufficient here to note that the present language originated in an amendment on the floor of the House. It was sponsored by Representative Reid of Illinois (69 Cong. Rec. 7030), who had a rather dramatic conception of the proposed floodways, and was insistent that flowage rights be acquired in advance. He said (69 Cong. Rec. 7000; see also pp. 7105, 7106):

I will never propose an amendment or support any section of this bill which will permit the turning down on innocent people in these so-called floodways of a torrent three times that of Niagara Falls *without first acquiring* the right-of-way or the flowage rights; \* \* \*. [Italics added.]

The Congressman seems plainly to have viewed his amendment as requiring a prior condemnation of land to be flooded. Such, we submit, is the sole purpose of the first paragraph of Section 4.

The first paragraph of Section 4 must, moreover, be read with the second; when this is done, its purpose as a direction to acquire flowage rights prior to flooding becomes plain. The second paragraph authorizes the Secretary to initiate proceedings to acquire the rights which are necessary to the project, in his opinion and that of the Chief of Engineers. If Section 4 raised a liability in the United States on suit by the landowners, there would be no occasion to direct the Secretary of War to acquire these rights.

Indeed, the requirement that the proceedings be instituted with respect to lands "which, in the opinion of the Secretary of War and of the Chief of Engineers, are needed in carrying out this project" was added to the earlier draft of the bill because, without it, the paragraph "does not specify who is to determine what land is necessary to be acquired."<sup>3</sup> This plainly implies that the section was designed merely as a direction to federal officers, and not intended to create a liability in suits determined by landowners to be brought.

Since the projected Boeuf Floodway has never been begun, and the United States does not plan

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<sup>3</sup>H. Rept. No. 1100, 70th Cong., 1st Sess., p. 6; see also H. Rept. No. 1555, 70th Cong., 1st Sess., p. 5.

any present diversion of waters over respondent's land, nothing in the section requires action on the part of its officers. And, certainly, if that be the case, there are no rights in the respondent created by implication.

*B. If Section 4 Does Relate to the Liability of the United States It Is Inapplicable Here*

It seems plain that Section 4 is simply a direction to federal officers to condemn rather than to take by flooding. But even if it were assumed that the section related to a substantive liability of the United States, it clearly is not applicable to this case.

1. *The Language of the Statute.*—Section 4 provides, in its essential clause, that "The United States shall provide flowage rights for additional destructive floodwaters that will pass by reason of diversions from the main channel of the Mississippi River." By its terms, the section is inapplicable to this case for any of three reasons.

(a) The section directs acquisition of flowage rights only when waters will pass *by reason of diversions from the main channel*. "Diversion" plainly means a purposeful and deliberate change in the course of the water; it is uniformly defined as *the act of turning aside from a course*.<sup>33</sup> As such, the section plainly relates to the controlled

<sup>33</sup> Webster's New International; Funk & Wagnalls New Standard; Century Dictionary and Cyclopedia; Murray's New English.

spillways contemplated by the plan," and quite possibly covers also the consequential increased flooding deliberately caused by other work combined with the failure to raise levees beyond their existing height. Whether or not inaction, in the latter circumstances, would be a "diversion," it plainly is not where the inaction combined with work elsewhere does not in fact cause water to be diverted or increase the danger of flooding.

(b) Section 4 is applicable only in the case of *additional destructive floodwaters*. Before the section could be thought to be a direction to acquire flowage rights, the land would have to be subject to destructive floodwaters and the waters would have to be additional to the floods theretofore passing over the lands. It is conjectural whether the lands are now subject to *any* flooding; it is certain that they are not subject to *additional* floods. The land was flooded in 1912, 1913, 1919, 1921, 1922, and 1927; it has not once been flooded since 1928 (*supra*, pp. 4, 11).

(c) Section 4 operates only when the waters *will* pass over the lands. The flooding must, therefore, be at least reasonably predictable. None can be sure that the land will again be flooded. The dredging and channel straightening were shown in 1937 greatly to have increased the carrying capacity

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<sup>22</sup> Jadwin Report, pars. 97, 114 (H. Rep. No. 1100, pp. 79, 82-83; Sen. Rep. No. 619, pp. 33, 36-37; each 70th Cong., 1st Sess.).

of the river (*supra*, pp. 9-10). The modification of the Flood Control Plan in 1936 inaugurated more extensive construction of reservoirs which, together with continued channel stabilization, may be expected substantially to reduce flood stages.<sup>25</sup> The Flood Control plans, it is true, call for eventual construction of the Eudora floodway guide levees, but this precaution against a flood of gigantic proportions does not make the flooding any the less conjectural.

2. *Legislative History of Section 4.*—The language of the statute, therefore, is clear evidence that it is inapplicable here. If more be needed, the legislative history offers ample confirmation. This history is intelligible only if the successive changes in Section 4 be kept clearly in mind. We shall, therefore, first sketch the broad developments in Section 4.

(a) The Jadwin Report included no estimates for damage to lands in the floodway, because, *inter alia*, except for the Birds Point and Bonnet Carre Floodways, the lands would have the same protection as under the then existing system. The report thought the states and localities should acquire the land in those floodways (Par. 32). The bill as reported to the Senate (69 Cong. Rec. 5483)

<sup>25</sup> Act of June 15, 1936, *infra*, p. 88; Report of Chief of Engineers, February 12, 1935, H. Doc. No. 1, 74th Cong., 1st Sess., pars. 39, 43.



simply enunciated, in detailed form, that just compensation should be paid for property taken.<sup>26</sup>

Section 4 was reported out by the House Committee with no change here material (69 Cong. Rec. 6665). On the floor the Section was amended; the amendment was introduced by Mr. Reid. It provided, in essence, that the Government should provide rights-of-way in lands "over which destructive floodwaters will pass by reason of diversion of the main channel" (69 Cong. Rec. 7030-7031).<sup>27</sup>

<sup>26</sup> "SEC. 4. Just compensation shall be paid by the United States for all property used, taken, damaged, or destroyed in carrying out the flood-control plan provided for herein, including all property located within the area of the spillways, floodways, or diversion channels herein provided, and the rights-of-way thereover, and the flowage rights thereon, and also including all expenditures by persons, corporations, and public-service corporations made necessary to adjust or conform their property, or to relocate same because of the spillways, floodways, or diversion channels herein provided: *Provided*, That in all cases where the execution of the flood-control plan results in benefits to any person, or persons, or corporations, municipal or private, such benefits shall be taken into consideration by way of reducing the amount of compensation to be paid."

The chief purpose of the provision seems to have been to afford a vehicle for the requirement that compensation be offset by benefits (69 Cong. Rec. 5487).

<sup>27</sup> The amendment struck out all of the first paragraph of Section 4 and substituted therefor: "The United States shall provide lands for rights-of-way over which destructive floodwaters will pass by reason of the diversion of the main channel of the Mississippi River, and for levees along such diversions, floodways, and spillways, and any lands, easements, flowage rights, or right-of-way necessary to control and regulate such diversion."

Mr. Frear was the leader of the opposition to the amendment, and opposed on the ground that it would subject the Government to unnecessary and tremendous cost in the purchase of lands or flowage rights throughout the floodways (69 Cong. Rec. 6657, 6660, 6779, 7000, 7107). The amendment was adopted (69 Cong. Rec. 7111). The first conference report made immaterial changes (69 Cong. Rec. 7778). The second report, however, added the important word "additional" to the description of the destructive floodwaters (69 Cong. Rec. 8119). Mr. Frear expressed himself as wholly satisfied. He said (69 Cong. Rec. 8120-8121):

\* \* \* The chairman of the committee will correct me if I am not stating this correctly. That word provides, in effect, that in these floodways, where they have been used heretofore for floodways, no damage can be collected from the Government unless it is "additional" damage due to the construction of levees. Where use of the floodways creates additional overflow because of greater floods caused by the works, then the Government might properly be held responsible to the extent of providing land for such additional overflow or flowage rights. \* \* \*

Of course, the effect of this change is to strike out the enormous expenditure of two or three hundred million dollars for buying up whole floodways that we have had in the bill heretofore.

\* \* \* This was an indefensible objection to the Senate and House bill which is now eliminated.

Mr. Reid agreed, and said (69 Cong. Rec. 8122):

\* \* \* I think we have the language corrected to meet the views of nearly everyone in the House. The United States will not now have to pay for flowage rights over lands now used in conducting the destructive water from the main Mississippi River. It was cured very simply by the addition of the word "additional." If the work puts any additional flood destruction on those lands, that must be provided for. \* \* \*

It is plain, therefore, that the bill as passed directed acquisition of flowage rights only where additional damage was to be caused. This damage, we think, might result either from flooding lands which were not flooded before or from increasing the destructive volume of the floods. In either event, Section 4 is wholly inapplicable to this case. The lands of the respondent have better flood protection than before inauguration of the plan; there is neither additional damage to the lands nor "additional destructive floodwaters" passing over them.

Much of the debate on the original Reid amendment envisaged a broader direction,<sup>28</sup> but as both

<sup>28</sup> See 69 Cong. Rec.: Mr. Reid (pp. 7000-7001, 7105, 7106); Mr. Frear (pp. 6657, 6660, 7000, 7107); Mr. Kopp (p. 6712); Mr. Cox (p. 7107).

Mr. Reid and the opposition recognized, the draft of the conference committee accomplished quite a different thing. However, two further points may be made: at all stages of debate it was recognized that the section related only to a deliberate diversion by the Government; and even when the bill was in its original form, and certainly in its amended form, it was recognized that the Government should be liable only in the event of actual or reasonably certain damage.

(b) There are many indications that the Reid amendment, even in its original form, was intended to apply only when the diversion was deliberate."

(It is, therefore, inapplicable here (*supra*, pp. 66-67).)

(c) It is equally plain that the amendment was never intended to do more than to direct acquisition of flowage rights where the damage from the Flood Control plan was certain or reasonably predictable. Mr. Reid many times made plain that his amendment related only to cases where property was *destroyed* by floods resulting from the Government's work (69 Cong. Rec. 6792, 7105).; he also stated that it referred only to floodways created by

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<sup>39</sup> Mr. Reid many times speaks of offering protection against "turning destructive floodwaters down upon innocent people" (69 Cong. Rec. 7000, 7001, 7105, 7106); again, he refers to the liability of the Government "where it diverts the water from the main channel" (69 Cong. Rec. 7001, 7105). Mr. Cox refers to "the turning in of this additional water" (69 Cong. Rec. 7106). Senator Wilson, speaking of the amendment as it left the conference, said that it referred to the water "which is deliberately diverted on the plans of the Government" (69 Cong. Rec. 8211).

virtue of this work, and did not reach natural floodways (69 Cong. Rec. 7000, 7001, 7105). Mr. Cox, in defending the amendment after expiration of the time of Mr. Reid, was even more explicit. He said (69 Cong. Rec. 7106-7107):

\* \* \* It simply means that where the turning in of this additional water inundating land not heretofore subject to overflow, the Government shall acquire flowage rights thereto.

\* \* \* The amendment simply proposes that when the land is flooded that has not heretofore been subject to flood, the Government may acquire flowage rights.

\* \* \* Except such lands the value of which is perpetually destroyed by the Government, \* \* \* the Government does not commit itself by this proposal to buy anything except the land for levee rights-of-way. \* \* \*

Here there has been no additional or actual damage to the land in the Boeuf Floodway; indeed, its flood protection has been enhanced.

### *C. Ratification by Congress*

Even if the statute were ambiguous, which it is not, the question has been put beyond dispute by the Act of June 15, 1936, *infra*, ratifying the administrative construction.



The orders of the President approving the projects also approved the purchase of flowage rights in the Birds Point and Bonnet Carre Floodways (November 21 and December 11, 1928). But the orders approving the Boeuf and Atchafalaya floodways, where no reduction in levee grades was proposed, made no mention of flowage rights (January 10 and 16, 1929).

The Report of the Chief of Engineers of February 12, 1935, transmitted to Congress, surveyed the work done under the Flood Control Act of 1928 and recommended certain modifications. Comm. Doc. No. 1, H. Comm. on Flood Control, 74th Cong., 1st Sess. It stated (par. 7) that the Government was acquiring flowage rights in the Birds Point Floodway—where levees were being cut down and flood protection reduced—and stated that the original plan “did not provide for the Federal compensation of land owners in the Boeuf and Atchafalaya Floodways where no reduction in the then existing heights of the protecting levees was proposed” (par. 17). The general principle was stated (par. 17) as follows:

\* \* \* No compensation has been paid landowners except where the protection that they previously enjoyed has been or will be reduced by the lowering of the levees under the plan. \* \* \*

The Report of the Chief of Engineers summarized the recommendations of the modifications in

Section 43. 'The Act of June 15, 1936, *infra*, p. 89, in Section 1 provided:

That the project for the control of floods of the Mississippi River \* \* \* is hereby modified in accordance with the recommendations of section 43 of the report submitted by the Chief of Engineers to the Chairman of the Committee on Flood Control, dated February 12, 1935, and printed in House Committee on Flood Control Document Numbered 1, Seventy-fourth Congress, first session, as hereinafter further modified and amended; and as so modified is hereby adopted and authorized and directed to be prosecuted under the direction of the Secretary of War and the supervision of the Chief of Engineers.

The Act of June 15, 1936, was passed in recognition of the prior administrative construction under which the landowners in the Boeuf Floodway would receive no payment. It did not change the language of Section 4; indeed, it specifically adopted the engineering modifications suggested by the Chief of Engineers in the report which called attention to the practice adopted with respect to these lands. The Act is, therefore, a ratification of the principle that compensation is to be paid only when the levees are reduced so that flood protection is in fact diminished. See *Mattingly v. District of Columbia*, 97 U. S. 687, 690; *Tiaco v. Forbes*, 228 U. S. 549, 556; *Swayne & Hoyt, Ltd. v. United States*, 300 U. S. 297, 301-302; *Mason Co. v. Tax Commission*, 302 U. S. 186, 208.

Section 12 of the 1936 Act, *infra*, pp. 91-92, it may be noted, does not reduce the force of the Congressional ratification. It rejected the proposal of the Chief of Engineers that flowage rights and levee rights-of-way be supplied by local property owners or governments, and provided instead that payment was to be made by the United States. The section continued:

no money appropriated under the authority of this Act shall be expended upon the construction of the Eudora floodway \* \* \* the back protection levee extending north from the Eudora Floodway \* \* \* until 75 per centum of the value of the flowage rights and rights-of-way for levee foundations, as estimated by the Chief of Engineers, shall have been acquired \* \* \*

Nothing in this section indicates that "flowage rights" are to be construed differently than theretofore; indeed, the Chief of Engineers is authorized to determine when 75 per cent of the necessary rights have been acquired. The Senate Commerce Committee, in reporting the bill (S. Rpt. no. 1662, 74th Cong., 2d Sess., pp. 8-11), made perfectly plain that Congress, as did the Chief of Engineers, intended to pay only the just compensation required by the Constitution.<sup>40</sup>

<sup>40</sup> The House Committee on Flood Control shortened the Senate committee's discussion and is, therefore, less explicit. But it contains nothing to contradict the Senate interpretation. H. Rept. No. 2583, 74th Cong., 2d Sess., pp. 9-10.

## CONCLUSION

We submit, therefore, that neither under the statute nor under the Constitution is respondent entitled to recover. The decision of the Circuit Court of Appeals should be reversed, and the decision of the District Court should be affirmed.

Respectfully submitted.

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SEPTEMBER 1939.

## APPENDIX

Act of July 18, 1918, c. 155, 40 Stat. 904, 911:

SEC. 5. That whenever the Secretary of War, in pursuance of authority conferred on him by law, causes proceedings to be instituted in the name of the United States for the acquirement by condemnation of any lands, easements, or rights-of-way needed for a work of river and harbor improvement duly authorized by Congress, the United States, upon the filing of the petition in any such proceedings, shall have the right to take immediate possession of said lands, easements, or rights-of-way, to the extent of the interest to be acquired, and proceed with such public works thereon as have been authorized by Congress: *Provided*, That certain and adequate provisions shall have been made for the payment of just compensation to the party or parties entitled thereto, either by previous appropriation by the United States or by the deposit of moneys or other form of security in such amount and form as shall be approved by the court in which such proceedings shall be instituted. The respondent or respondents may move at any time in the court to increase or change the amounts or securities, and the court shall make such order as shall be just in the premises and as shall adequately protect the respondents. In every case the proceedings in condemnation shall be diligently prosecuted on the part of the United States in order that such compensation may be promptly ascertained and paid.



**SEC. 6.** That in all cases where private property shall be taken by the United States for the public use in connection with any improvement of rivers, harbors, canals, or waterways of the United States, and in all condemnation proceedings by the United States to acquire lands or easements for such improvements, where a part only of any such parcel, lot, or tract of land shall be taken, the jury or other tribunal awarding the just compensation or assessing the damages to the owner, whether for the value of the part taken or for any injury to the part not taken, shall take into consideration by way of reducing the amount of compensation or damages any special and direct benefits to the remainder arising from the improvement, and shall render their award or verdict accordingly.

The Flood Control Act of May 15, 1928, c. 569, 45 Stat. 534 (U. S. C., Title 33, Sec. 702a *et seq.*) provides as follows:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the project for the flood control of the Mississippi River in its alluvial valley and for its improvement from the Head of Passes to Cape Girardeau, Missouri, in accordance with the engineering plan set forth and recommended in the report submitted by the Chief of Engineers to the Secretary of War dated December 1, 1927; and printed in House Document Numbered 90, Seventieth Congress, first session, is hereby adopted and authorized to be prosecuted under the direction of the Secretary of War and the supervision of the Chief of Engineers: *Provided,* That a board to consist of the Chief of En-

gineers, the president of the Mississippi River Commission, and a civil engineer chosen from civil life to be appointed by the President, by and with the advice and consent of the Senate, whose compensation shall be fixed by the President and be paid out of the appropriations made to carry on this project, is hereby created; and such board is authorized and directed to consider the engineering differences between the adopted project and the plans recommended by the Mississippi River Commission in its special report dated November 28, 1927, and after such study and such further surveys as may be necessary, to recommend to the President such action as it may deem necessary to be taken in respect to such engineering differences and the decision of the President upon all recommendations or questions submitted to him by such board shall be followed in carrying out the project herein adopted. The board shall not have any power or authority in respect to such project except as hereinbefore provided. Such project and the changes therein, if any, shall be executed in accordance with the provisions of section 8 of this Act. Such surveys shall be made between Baton Rouge, Louisiana, and Cape Girardeau, Missouri, as the board may deem necessary to enable it to ascertain and determine the best method of securing flood relief in addition to levees, before any flood-control works other than levees and revetments are undertaken on that portion of the river: *Provided*, That all diversion works and outlets constructed under the provisions of this Act shall be built in a manner and of a character which will fully and amply protect the adjacent lands: *Provided further*, That pending com-

pletion of any floodway, spillway, or diversion channel, the areas within the same shall be given the same degree of protection as is afforded by levees on the west side of the river contiguous to the levee at the head of said floodway, but nothing herein shall prevent, postpone, delay, or in anywise interfere with the execution of that part of the project on the east side of the river, including raising, strengthening, and enlarging the levees on the east side of the river. The sum of \$325,000,000 is hereby authorized to be appropriated for this purpose.

All unexpended balances of appropriations heretofore made for prosecuting work of flood control on the Mississippi River in accordance with the provisions of the Flood Control Acts approved March 1, 1917, and March 4, 1923, are hereby made available for expenditure under the provisions of this Act, except section 13.

SEC. 2. That it is hereby declared to be the sense of Congress that the principle of local contribution toward the cost of flood-control work, which has been incorporated in all previous national legislation on the subject, is sound, as recognizing the special interest of the local population in its own protection, and as a means of preventing inordinate requests for unjustified items of work having no material national interest. As a full compliance with this principle in view of the great expenditure estimated at approximately \$292,000,000, heretofore made by the local interests in the alluvial valley of the Mississippi River for protection against the floods of that river; in view of the extent of national concern in the control of these floods in the interests of national prosperity, the flow of interstate commerce,

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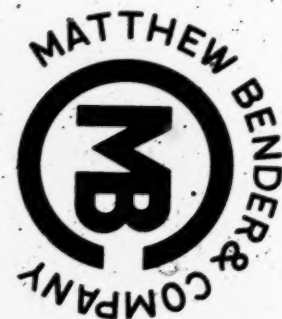
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and the movement of the United States mails; and, in view of the gigantic scale of the project, involving flood waters of a volume and flowing from a drainage area largely outside the States most affected, and far exceeding those of any other river in the United States, no local contribution to the project herein adopted is required.

SEC. 3. Except when authorized by the Secretary of War upon the recommendation of the Chief of Engineers, no money appropriated under authority of this Act shall be expended on the construction of any item of the project, until the States or levee districts have given assurances satisfactory to the Secretary of War that they will (a) maintain all flood-control works after their completion, except controlling and regulating spillway structures, including special relief levees; maintenance includes normally such matters as cutting grass, removal of weeds, local drainage, and minor repairs of main river levees; (b) agree to accept land turned over to them under the provisions of section 4; (c) provide without cost to the United States, all rights-of-way for levee foundations and levees on the main stem of the Mississippi River between Cape Girardeau, Missouri, and the Head of Passes.

No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place: *Provided, however,* That if in carrying out the purposes of this Act it shall be found that upon any stretch of the banks of the Mississippi River it is impracticable to construct levees, either because such construction is not economically justified or because such construction would unreasonably restrict the flood channel, and lands in such



stretch of the river are subjected to overflow and damage which are not now overflowed or damaged by reason of the construction of levees on the opposite banks of the river, it shall be the duty of the Secretary of War and the Chief of Engineers to institute proceedings on behalf of the United States Government to acquire either the absolute ownership of the lands so subjected to overflow and damage or floodage rights over such lands.

SEC. 4. The United States shall provide flowage rights for additional destructive flood waters that will pass by reason of diversions from the main channel of the Mississippi River: *Provided*, That in all cases where the execution of the flood-control plan herein adopted results in benefits to property such benefits shall be taken into consideration by way of reducing the amount of compensation to be paid.

The Secretary of War may cause proceedings to be instituted for the acquirement by condemnation of any lands, easements, or rights-of-way which, in the opinion of the Secretary of War and the Chief of Engineers, are needed in carrying out this project, the said proceedings to be instituted in the United States district court for the district in which the land, easement, or right-of-way is located. In all such proceedings the court, for the purpose of ascertaining the value of the property and assessing the compensation to be paid, shall appoint three commissioners, whose award, when confirmed by the court, shall be final. When the owner of any land, easement, or right-of-way shall fix a price for the same which, in the opinion of the Secretary of War is reasonable, he may purchase the same at

such price; and the Secretary of War is also authorized to accept donations of lands, easements, and rights-of-way required for this project. The provisions of sections 5 and 6 of the River and Harbor Act of July 18, 1918, are hereby made applicable to the acquisition of lands, easements, or rights-of-way needed for works of flood control: *Provided*, That any land acquired under the provisions of this section shall be turned over without cost to the ownership of States or local interests.

\* \* \* \* \*

SEC. 8. The project herein authorized shall be prosecuted by the Mississippi River Commission under the direction of the Secretary of War and supervision of the Chief of Engineers and subject to the provisions of this Act. It shall perform such functions and through such agencies as they shall designate after consultation and discussion with the president of the commission. For all other purposes the existing laws governing the constitution and activities of the commission shall remain unchanged. The commission shall make inspection trips of such frequency and duration as will enable it to acquire first-hand information as to conditions and problems germane to the matter of flood control within the area of its jurisdiction; and on such trips of inspection ample opportunity for hearings and suggestions shall be afforded persons affected by or interested in such problems. The president of the commission shall be the executive officer thereof and shall have the qualifications now prescribed by law for the Assistant Chief of Engineers, shall have the title brigadier general, Corps of Engineers, and shall have the

rank, pay, and allowances of a brigadier general while actually assigned to such duty: *Provided*, That the present incumbent of the office may be appointed a brigadier general of the Army, retired, and shall be eligible for the position of president of the commission if recalled to active service by the President under the provisions of existing law.

The salary of the president of the Mississippi River Commission shall hereafter be \$10,000 per annum, and the salary of the other members of the commission shall hereafter be \$7,500 per annum. The official salary of any officer of the United States Army or other branch of the Government appointed or employed under this Act shall be deducted from the amount of salary or compensation provided by, or which shall be fixed under, the terms of this Act.

SEC. 9. The provisions of sections 13, 14, 16, and 17 of the River and Harbor Act of March 3, 1899, are hereby made applicable to all lands, waters, easements, and other property and rights acquired or constructed under the provisions of this Act.

SEC. 10. That it is the sense of Congress that the surveys of the Mississippi River and its tributaries, authorized pursuant to the Act of January 21, 1927, and House Document Numbered 308, Sixty-ninth Congress, first session, be prosecuted as speedily as practicable, and the Secretary of War, through the Corps of Engineers, United States Army, is directed to prepare and submit to Congress at the earliest practicable date projects for flood control on all tributary streams of the Mississippi River system subject to destructive floods which projects shall include: The Red River and

tributaries, the Yazoo River and tributaries, the White River and tributaries, the Saint Francis River and tributaries, the Arkansas River and tributaries, the Ohio River and tributaries, the Missouri River and tributaries and the Illinois River and tributaries; and the reports thereon, in addition to the surveys provided by said House Document 308, Sixty-ninth Congress, first session, shall include the effect on the subject of further flood control of the lower Mississippi River to be attained through the control of the flood waters in the drainage basins of the tributaries by the establishment of a reservoir system; the benefits that will accrue to navigation and agriculture from the prevention of erosion and siltage entering the stream; a determination of the capacity of the soils of the district to receive and hold waters from such reservoirs; the prospective income from the disposal of reservoired waters; the extent to which reservoired waters may be made available for public and private uses; and inquiry as to the return flow of waters placed in the soils from reservoirs, and as to their stabilizing effect on stream flow as a means of preventing erosion, siltage, and improving navigation: *Provided*, That before transmitting such reports to Congress the same shall be presented to the Mississippi River Commission, and its conclusions and recommendations thereon shall be transmitted to Congress by the Secretary of War with his report.

The sum of \$5,000,000 is hereby authorized to be used out of the appropriation herein authorized in section 1 of this Act, in addition to amounts authorized in the River and Harbor Act of January 21, 1927, to be expended under the direction of the Secretary

of War and the supervision of the Chief of Engineers for the preparation of the flood-control projects authorized to be submitted to Congress under this section: *Provided further*, That the flood surveys herein provided for shall be made simultaneously with the flood-control work on the Mississippi River provided for in this Act: *And provided further*, That the President shall proceed to ascertain through the Secretary of Agriculture and such other agencies as he may deem proper, the extent to and manner in which the floods in the Mississippi Valley may be controlled by proper forestry practice.

SEC. 11. That the Secretary of War shall cause the Mississippi River Commission to make an examination and survey of the Mississippi River below Cape Girardeau, Missouri, (a) at places where levees have heretofore been constructed on the one side of the river and the lands on the opposite side have been thereby subjected to greater overflow, and where, without unreasonably restricting the flood channel, levees can be constructed to reduce the extent of this overflow, and where the construction of such levees is economically justified, and report thereon to the Congress as soon as practicable with such recommendations as the commission may deem advisable; (b) with a view to determining the estimated effects, if any, upon lands lying between the river and adjacent hills by reason of overflow of such lands caused by the construction of levees at other points along the Mississippi River, and determining the equities of the owners of such lands and the value of the same, and the commission shall report thereon to the Congress as soon as practicable with such rec-



ommendation as it may deem advisable: *Provided*, That inasmuch as the Mississippi River Commission made a report on the 26th day of October, 1912, recommending a levee to be built from Tiptonville, Tennessee, to the Obion River in Tennessee, the said Mississippi River Commission is authorized to make a resurvey of said proposed levee and a relocation of the same if necessary, and if such levee is found feasible, and is approved by the board created in section 1 of this Act, and by the President the same shall be built out of appropriations hereafter to be made.

SEC. 12. All laws or parts of laws inconsistent with the above are hereby repealed.

The Act of June 15, 1936 (c. 548, 49 Stat. 1508; U. S. C. Supp., Title 33; Sec. 702a-2, *et seq.*) amending the Flood Control Act of 1928, provides as follows:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the project for the control of floods of the Mississippi River and its tributaries, adopted by Public Act Numbered 391, approved May 15, 1928 (45 Stat. 534), Seventieth Congress, entitled "An Act for the control of floods on the Mississippi River and its tributaries, and for other purposes", is hereby modified in accordance with the recommendations of section 43 of the report submitted by the Chief of Engineers to the Chairman of the Committee on Flood Control, dated February 12, 1935, and printed in House Committee on Flood Control Document Numbered 1, Seventy-fourth Congress, first session, as hereinafter further modified and amended; and as so modified is hereby adopted and

authorized and directed to be prosecuted under the direction of the Secretary of War and the supervision of the Chief of Engineers.

SEC. 2. That the Boeuf Floodway, authorized by the provisions adopted in the Flood Control Act of May 15, 1928, shall be abandoned as soon as the Eudora Floodway, provided for in Flood Control Committee Document Numbered 1, Seventy-fourth Congress, first session, is in operative condition and the back-protection levee recommended in said document, extending north from the head of the Eudora Floodway, shall have been constructed.

\* \* \* \* \*

SEC. 4. That neither of the projects for the flood control of the Saint Francis River or the Yazoo River, hereby authorized, shall be undertaken until the States, or other qualified agencies, shall have furnished satisfactory assurances that they will undertake, without cost to the United States, all alterations of highways made necessary because of the construction of the authorized reservoirs, and meet all damages because of such highway alterations, and have agreed also to furnish without cost to the United States all lands and easements necessary to the construction of levees and drainage ditches constructed under this project; *Provided*, That the reservoirs for control of headwater flow of the Yazoo River system may be located by the Chief of Engineers, in his discretion: *And provided further*, That the Chief of Engineers may, in his discretion, substitute levees, floodways, or auxiliary channels, or any or all of them, for any or all of the seven detention reservoirs recommended in his report of February 12, 1935, for the control of floods of the Yazoo

River: *And provided further*, That the Chief of Engineers, with the approval of the Secretary of War, may modify the project for the flood control of the Saint Francis River as recommended in said report, to include therein the construction of a detention reservoir for the reduction of floods, and the acquisition at the cost of the United States of all lands and flowage necessary to the construction of said reservoir except flowage of highways: *Provided further*, That the estimated cost to the United States of the project is not increased by reason of such detention reservoir.

\* \* \* \* \*

SEC. 10. After the Eudora Floodway shall have been constructed and is ready for operation, the fuse-plug levees now at the head of the Boeuf and Tensas Basins shall be constructed to the 1914 grade and the 1928 section. The fuse-plug levees at the head of the Atchafalaya Basin on the west side shall be constructed to the 1914 grade and the 1928 section. The fuse-plug levees at the head of the Atchafalaya Basin on the east side of the Atchafalaya River shall be constructed to the 1914 grade and 1928 section, and, after the Morganza Floodway has been completed, shall be raised to the 1928 grade as provided in section 3 of this Act. Thereafter those stretches of said levees which are left as fuse-plug levees shall be reconstructed and maintained as herein provided, subject to the provisions of section 3 of this Act. Any funds appropriated under authority of this Act may be expended for this purpose.

SEC. 11. That the back-protection levee north of the Eudora Floodway shall be constructed to the same grade and section as the levees opposite on the east side of the Mis-

Mississippi River: *Provided*, That this levee extending from the head of the Eudora Floodway north to the Arkansas River shall be so located as to afford adequate space for the passage of flood waters without endangering the levees opposite on the east side of the river and shall be constructed contemporaneously with the construction of the Eudora Floodway; except that, until the Eudora Floodway is in operative condition, there shall be left in this back levee north of the head of the Eudora Floodway openings which shall be sufficient, in the discretion of the Chief of Engineers, to permit the passage of all flood waters to be reasonably contemplated in the event of any break in the riverside fuse-plug levee prior to the time the Eudora Floodway shall be in operative condition.

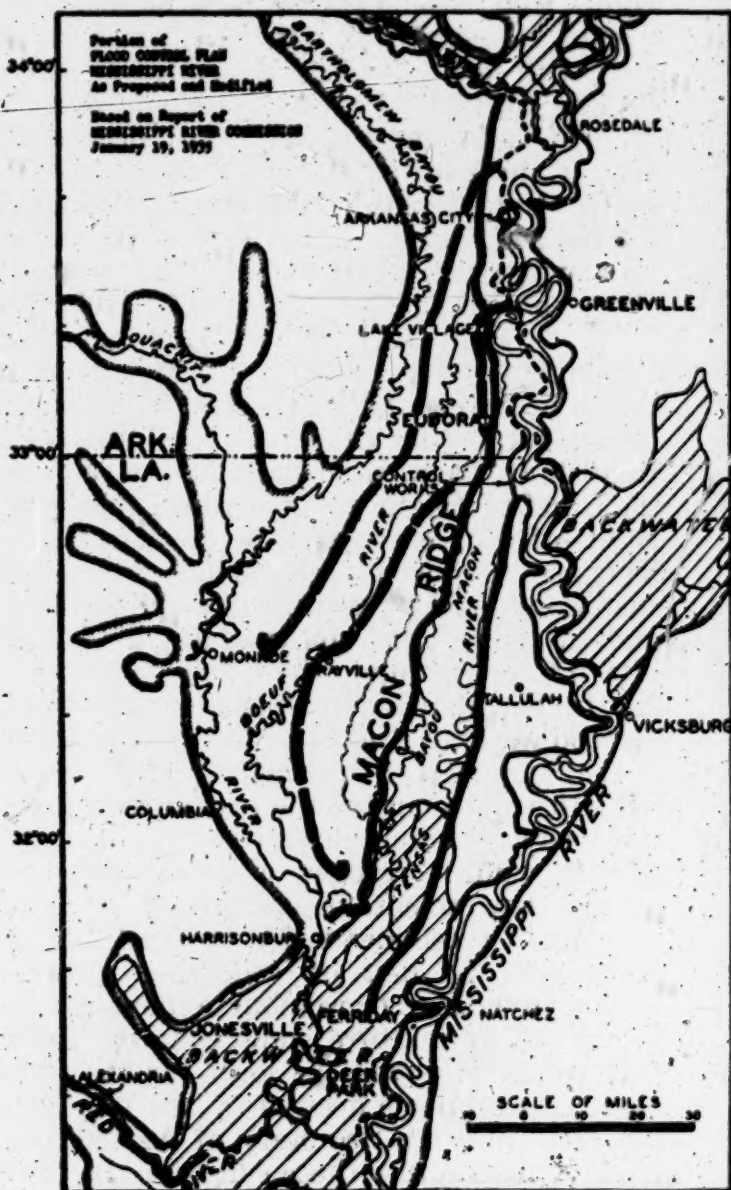
SEC. 12. In order to facilitate the United States in the acquisition of flowage rights and rights-of-way for levee foundations, the Secretary of War is authorized to enter into agreements with the States or with local levee districts, boards, commissions, or other agencies for the acquisition and transfer to the United States of such flowage rights and levee rights-of-way, and for the reimbursement of such States or local levee districts, boards, commissions, or other agencies, for the cost thereof at prices previously agreed upon between the Secretary of War and the governing authority of such agencies, within the maximum limitations hereinafter prescribed: *Provided*, That no money appropriated under the authority of this Act shall be expended upon the construction of the Eudora Floodway, the Morganza Floodway, the back protection levee extending north from the Eudora Floodway, or the levees extending from the head of the Morganza

Floodway to the head of and down the east bank of the Atchafalaya River to the intersection of said Morganza Floodway until 75 per centum of the value of the flowage rights and rights-of-way for levee foundations, as estimated by the Chief of Engineers, shall have been acquired or options or assurances satisfactory to the Chief of Engineers shall have been obtained for the Eudora Floodway, the Morganza Floodway, and the area lying between said back protection levee and the present front line levees; *Provided further*, That easements required in said areas in connection with roads and other public utilities owned by States or political subdivisions thereof shall be provided without cost to the United States upon the condition that the United States shall provide suitable crossings, including surfacing of like character, over floodway guide-line levees in said areas for all improved roads now constituting a part of the State highway system, and shall repair all damage done to said highways within the said floodways by the actual use of such floodways for diversion: *Provided further*, That when such portion of said rights as to all of said areas shall have been acquired or obtained and when said easements required in connection with roads and other public utilities owned by States or political subdivisions thereof have been provided as hereinabove set forth, construction of said flood-control works in said areas shall be undertaken according to the engineering recommendations of the Report of the Chief of Engineers dated February 12, 1935 (House Committee on Flood Control Document Numbered 1, Seventy-fourth Congress, first session), and the Secretary of War shall cause proceedings to be instituted for the



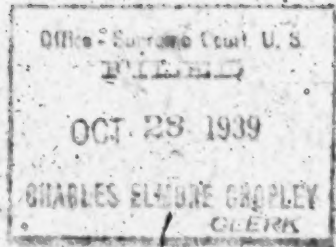
condemnation of the remainder of said rights and easements, as are needed and cannot be secured by agreement, in accordance with section 4 of the Flood Control Act of May 15, 1928: *Provided further*, That in no event and under no circumstances shall any of the additional money appropriated under the authority of this Act be expended for the acquisition of said 75 per centum of the flowage rights and rights-of-way hereinabove contemplated in excess of \$20,000,000:

\* \* \* *Provided further*, That payment for rights-of-way, easements, and flowage rights acquired under this section, or reimbursement to the States or local interests furnishing them, shall be made as soon as the Chief of Engineers is satisfied that such rights-of-way, easements, or flowage rights have been acquired in conformity with local custom or legal procedure in such matters; and, thereafter, no liability of any kind shall attach to or rest upon the United States for any further damage by reason of diversions or flood waters: *And provided further*, That if the Secretary of Agriculture shall determine to acquire any of the properties within the floodways herein referred to, for national forests, wildlife refuges, or other purposes of his Department, the Secretary of War may, upon recommendation by the Chief of Engineers, in lieu of acquiring flowage rights, advance to or reimburse the said Secretary of Agriculture sums equal to those that would otherwise be used for the purchase of easements desired by the War Department and the Secretary of Agriculture is authorized to use these sums for the purpose of acquiring properties in the floodways in question.





FILE COPY



No. 72

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*In the Supreme Court of the United States*

OCTOBER TERM, 1939

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UNITED STATES OF AMERICA, PETITIONER

v.

MRS. JULIA CAROLINE SPONENBARGER ET AL.

---

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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SUPPLEMENTAL BRIEF FOR THE UNITED STATES

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SUPPLEMENTAL BRIEF FOR THE UNITED STATES

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## I

MISSISSIPPI FLOOD CONTROL: 1928-1939.

We have shown, in our main brief (pp. 43-47) and in our brief in *Franklin v. United States*, No. 26<sup>7</sup> (pp. 12-26), that even if respondent's land were subject to an increased flood hazard because of flood control work by the United States, there would be no liability. But we also go further than necessary, and insist that the land is in fact receiving increased flood protection.

This issue is predominantly factual. As such, it is controlled by the findings of the District Court.

Those findings, however, may appropriately be read against the larger canvas of the whole flood-control problem of the Mississippi River. Respondent relies liberally upon reports to Congress, statements made in Congressional hearings, and debate on the floor to establish the extent of the damage to her land. If we were to place each of these statements in their context, both documentary and chronological, most of the differences between petitioner and respondent would be eliminated. But since respondent's discussion runs to more than 400 pages, a detailed explanation of each statement would be likely to heighten the confusion. We shall, therefore, attempt no more than to supply a general framework of the history of Mississippi flood control since the Act of May 15, 1928. This outline, we believe, will be sufficient to give each of the statements relied upon by the respondent its proper content, by reference to the engineering plans and predictions at the time the statement was made.

1. *The Project Flood.*—The Mississippi River has a minimum flow of 103,000 cubic feet per second below the Arkansas River,<sup>1</sup> and an annual average flow of 560,000 second-feet.<sup>2</sup> These flows are

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<sup>1</sup> H. Doc. No. 90, 70th Cong., 1st Sess. (hereafter cited as *Jadwin Report*), par. 45.

<sup>2</sup> General Ferguson, President of Mississippi River Commission, Hearings on S. 3354, Senate Committee on Commerce, 1938, 75th Cong., 3d Sess. (hereafter cited as 1938 Senate Hearings), p. 63.

enormously increased in times of flood. The greatest recorded flow from each of the main flood sources is: Upper Mississippi River, 370,000 second-feet; Missouri River, 550,000 second-feet; Ohio River, 2,000,000 second-feet; Arkansas, St. Francis, and White Rivers, 1,280,000 second-feet.<sup>3</sup> If all of these flood sources gave their maximum flow simultaneously, a devastating flood of about 4,200,000 cubic feet per second would result. However, this synchronization of floods is most unlikely,<sup>4</sup> and the Weather Bureau and the Army Corps of Engineers have concluded that the weather conditions which cause the floods are such that synchronization is impossible.<sup>5</sup> The greatest recorded flood was that of 1927, when about 2,500,000 second-feet would have passed Arkansas City, if the river had been confined.<sup>6</sup> Second only to the flood of 1927 is that of 1937, when 2,150,000 cubic feet per second went past Arkansas City.<sup>7</sup> The flood control plans

<sup>3</sup> General Schley, Chief of Engineers, Hearings on Flood Control plans, House Committee on Flood Control, 1938, 75th Cong., 3d Sess. (hereafter cited as 1938 House Hearings), p. 19; General Ferguson, 1938 Senate Hearings, p. 39; Elliott, Improvement of lower Mississippi River (1932), I, p. 93.

<sup>4</sup> General Ferguson, 1938 Senate Hearings, p. 57.

<sup>5</sup> General Schley, 1938 House Hearings, p. 19.

<sup>6</sup> H. Report No. 1072, 70th Cong., 1st Sess., p. 326; General Ferguson, 1938 Senate Hearings, pp. 52-53.

<sup>7</sup> Flood Control Plan for Ohio and Lower Mississippi Rivers, Report of Chief of Engineers, 1937, House Flood Control Committee Doc. No. 1, 75th Cong., 1st Sess. (hereafter cited as Markham 1937 Report), par. 20; General Ferguson, 1938 Senate Hearings, p. 40.

are based upon a theoretical flood of 3,000,000 or 3,200,000 cubic feet per second." This "super-flood" is not probable, but the Army engineers feel forced to think in terms "of an increase over any flood we have ever had by an amount that we do not know and which might be greater than we have even dared to estimate."

The last decade has seen large-scale flood control planning and construction to meet this "project flood." The major types of projects which have been included in the plans at one time or another during this period include: (1) increase in height of the levees on the Mississippi and its tributaries; (2) the Birds Point floodway; (3) the Tensas basin floodway; (4) the Bonnet Carre floodway; (5) the Atchafalaya floodways; (6) channel cut-offs; and (7) tributary reservoirs. We shall deal, in summary fashion, with each of these projects.

2. *The Birds Point and Bonnet Carre Floodways.*—(a) The Birds Point floodway is designed, in time of flood, to become an additional channel for the Mississippi River below the confluence of the Ohio and Mississippi Rivers, and thus to protect Cairo, Illinois by increasing the discharge capacity of the river below the city.<sup>9</sup> The project calls for lowering an eleven-mile stretch of the river

<sup>9</sup> Jadwin Report, par. 100; General Ferguson, 1938 Senate Hearings, p. 52; General Schley, 1938 House Hearings, p. 19.

<sup>9</sup> General Ferguson, 1938 Senate Hearings, p. 53.

<sup>10</sup> Jadwin Report, pars. 13, 125.



levee by about three feet and building a stronger and higher levee, set back about 5 miles.<sup>11</sup> The river levees have not yet been lowered, but the floodway is otherwise substantially completed; water was carried through it during the 1937 flood.<sup>12</sup> Since the water returns to the river at New Madrid, the floodway has no effect on the lower river. (b) The Bonnet Carre floodway is designed to protect New Orleans by discharging floodwater into Lake Pontchartrain. The Atchafalaya floodways will be operated so that the Mississippi will never be required to carry more than 1,500,000 second-feet past Baton Rouge; the Bonnet Carre floodway will relieve the river of 250,000 second-feet before it reaches New Orleans.<sup>13</sup> It has been completed and was operated in 1937.<sup>14</sup> It has only a limited effect upon the discharge capacity of the upper river.

3. *Increased Levee Protection.*—All flood control plans since the Jadwin Report have been based on the premise that the height of the levees on the Mississippi River could not be increased by any considerable amount.<sup>15</sup> It was, however, recommended in that report that the Mississippi levees

<sup>11</sup> Jadwin Report, pars. 125, 126.

<sup>12</sup> Markham 1937 Report, par. 9; 1938 Annual Report of Chief of Engineers, pp. 2015, 2086-2087.

<sup>13</sup> Jadwin Report, pars. 18, 114.

<sup>14</sup> Markham 1937 Report, par. 9; 1938 Annual Report of Chief of Engineers, pp. 2089-2090.

<sup>15</sup> Jadwin Report, pars. 6, 55, 76-80.

be strengthened and raised; they have been raised, in general, by 3 or 3½ feet from the 1914 grade, except at the head of the projected floodways and along the Birds Point floodway; similarly heightened levees were recommended for the south banks of the Arkansas and Red Rivers.<sup>16</sup> This work is now virtually completed.<sup>17</sup> The Act of June 28, 1938, *infra*, p. 25, directs that the levee at the head of the Eudora floodway be constructed to the stronger 1928 section, although retained at the 1914 grade. This work is now in progress.

4. *The Atchafalaya Floodways.*—The Atchafalaya River forms a natural alternative outlet for the Mississippi, meeting the Old River at the point of junction with the Red River about 5 or 10 miles from the Mississippi. Under the Jadwin plan, the Atchafalaya was to be confined by levees with a parallel floodway on each side.<sup>18</sup> The modification in the Act of June 15, 1936, substituted the Morganza floodway, with its head on the Mississippi about 15 miles downstream from the Old River, for the east Atchafalaya floodway but retained substantially the original plan for the Atchafalaya River and the west Atchafalaya floodway; a new outlet to the Gulf for the lower Atchafalaya backwaters was

<sup>16</sup> Jadwin Report, pars. 123, 125, 127, 129; R. 357.

<sup>17</sup> Report of Chief of Engineers on Flood Control Works, 1935, House Flood Control Committee Doc. No. 1, 74th Cong., 1st Sess. (hereafter cited as Markham 1935 Report), pars. 7-9; Markham 1937 Report, par. 7; 1938 Annual Report of Chief of Engineers, p. 2072.

<sup>18</sup> Jadwin Report, pars. 19, 109.

also provided.<sup>19</sup> It is contemplated, in rough approximation, that the Atchafalaya River will carry 500,000 cubic feet per second; when it is operating at capacity the controlled spillway will divert up to another 500,000 second-feet down the Morganza floodway; finally, if this is insufficient, the west Atchafalaya floodway will carry another 500,000 second-feet.<sup>20</sup> The levees on the river and forming the west Atchafalaya floodway are substantially complete. The Morganza floodway was tied to the Eudora floodway in Section 12 of the Act of June 15, 1936, and construction was delayed by the inability to condemn land until 75 percent of the necessary easements in both floodways had voluntarily been given; the 1938 Act, *infra*, p. 24, authorizes separate and immediate construction of the Morganza floodway and permits condemnation of all land.

The Atchafalaya and the Morganza floodways, together with the additional outlet to the Gulf, will serve to increase the capacity of the river at the latitude of the Red River and upstream from that point. This is because it will permit a more rapid discharge of the river, with a consequent lowering of flood stages, and an increase in the slope of the river. The increase in slope resulting from more rapid discharge, assuming the Atchafalaya floodways and outlets were to drop the river an

<sup>19</sup> Markham 1935 Report, pars. 19, 21, 31, 43-47.

<sup>20</sup> General Ferguson, 1938 House Hearings, p. 38.

additional 6 feet, would produce about 1,000,000 horsepower (at a 2,000,000 second-foot discharge) serving to push the river downstream.<sup>21</sup> None has yet estimated the effect of the Morganza floodway upon the capacity of the river as far upstream as Arkansas City, but it is agreed that it will have a tendency to lower the river stages in that region.<sup>22</sup>

5. *Channel Cut-Offs*.—Engineers have long been attracted by the idea of increasing the capacity of the Mississippi by making cut-offs through its many looping bends. The proposals were earlier rejected as too dangerous (Br. for Respondent, pp. 403-405). The Jadwin Report unequivocally rejects this alternative as too uncertain, because of fear of the increased velocity of the water and the possibility that new bends will be formed.<sup>23</sup> Notwithstanding the absence of this feature from the adopted project,<sup>24</sup> the years subsequent to 1932 saw an increasing experimentation with this approach to flood control. The 370-mile stretch between the Arkansas and the Red Rivers has already been shortened by 115 miles.<sup>25</sup> An enlarged program has been recommended to and adopted by Con-

<sup>21</sup> General Ferguson, 1938 Senate Hearings, p. 63.

<sup>22</sup> General Schley, 1938 House Hearings, p. 850; General Ferguson, 1938 Senate Hearings, p. 63.

<sup>23</sup> Jadwin Report, pars. 69-71; see, also, *Elliott*, I, pp. 58 *et seq.*

<sup>24</sup> Any lack of authority has been ratified by Congress. See *infra*, p. 22.

<sup>25</sup> General Ferguson, 1938 House Hearings, p. 37.

gress.<sup>26</sup> The considerably increased capacity of the river in 1937 was probably due to the successful operation of the cut-offs,<sup>27</sup> and their effect will be even greater when the work has been completed so as to permit them to operate at full capacity.<sup>28</sup> They may so lower the flood stages of the river that the Eudora fuse-plug will retain more water than the safe capacity of the lower river,<sup>29</sup> but their full effect cannot even be estimated at this time.<sup>30</sup>

6. *Reservoirs*.—It has been recognized from the outset that the ideal method of flood control would be the construction of reservoirs on the tributary rivers of the Mississippi and their tributaries (if locations sufficiently close to the alluvial valley were available). The Jadwin Report rejected this alternative as too expensive unless developed for the local benefits of local flood protection, water storage and power projects (pars. 81–95). The Act of May 15, 1928, in Section 10 appropriated \$5,000,000 for a further survey of tributary reservoirs. Subsequent reports of the Chief of Engineers recommended an extensive system of reser-

<sup>26</sup> Markham 1935 Report, pars. 19d, 21f, 34–35, 43 (9); Markham 1937 Report, par. 36; Sec. 1, Act of June 15, 1936; Sec. 1, Act of June 28, 1938; *infra*, p. 23.

<sup>27</sup> Markham 1937 Report, par. 36; General Ferguson, 1938 Senate Hearings, pp. 50, 73.

<sup>28</sup> General Ferguson, 1938 Senate Hearings, p. 50; General Schley, 1938 House Hearings, p. 850.

<sup>29</sup> Markham 1935 Report, par. 10.

<sup>30</sup> General Schley, 1938 House Hearings, p. 850.



voirs; many of these projects were adopted in the 1936 and 1938 Acts.<sup>31</sup> In summary, some 144 tributary reservoirs have now been authorized.<sup>32</sup> The reservoirs will, in general, contribute more to local benefits than to reduction of the Mississippi floods,<sup>33</sup> but the Chief of Engineers has estimated that when completed the comprehensive reservoir plan will serve to reduce flood stages by upwards

<sup>31</sup> Markham 1935 Report, pars. 19e, 21g, 25, 38-41, 43 (9); Markham 1937 Report, pars. 13-25, 38 (a); Act of June 15, 1936, Sec. 1 (Br. 88); Act of June 28, 1938, Sec. 1 (*infra*, p. 23).

<sup>32</sup> H. Rept. No. 2353, 75th Cong., 3d Sess. (hereafter cited as 1938 House Report), pp. 9-21, together with 1935 Markham Report, pars. 5, 39, 43 (10) shows that the reservoirs (with the dates of their authorization) are distributed as follows:

Ohio basin		78
1934	14	
1935	1	
1936	14	
1938	49	
Upper Mississippi basin		12
1936	2	
1938	10	
Missouri basin		10
1935	1	
1938	9	
White basin		15
1936	9	
1938	6	
Arkansas basin		13
1936	6	
1937	1	
1938	6	
Yazoo basin		7
1936	7	
Red basin		1
1938	1	
Total		136

<sup>33</sup> General Schley, 1938 House Hearings, p. 4; General Ferguson, 1938 House Hearings, p. 50.

of 540,000 cubic feet per second.<sup>34</sup> The reservoir projects were not sufficiently advanced to afford any protection during the 1937 flood.

7. *The Tensas Floodway.*—As developed at length in our main brief, the 1928 Act authorized construction of the Boeuf floodway through the Tensas basin and the 1936 Act authorized substitution of the Eudora floodway. The Jadwin Report contemplated a fuse-plug levee of 33 miles; the levees have in fact been left at the 1914 grade for about 60 miles.<sup>35</sup> The Eudora project calls for a controlled spillway at Eudora, about 45 miles below Arkansas City, with the floodway proper, contained between guide levees, running south from there; however, a back protection levee of 1928 grade is to run north to the Arkansas River levees, to guard against backwater and overtopping of the fuse-plug levees.<sup>36</sup> No work was ever done on the Boeuf

<sup>34</sup> The Ohio reservoirs will reduce Mississippi floods by 200,000 second-feet, the Missouri reservoirs by 140,000 second-feet, and the Arkansas and White reservoirs by 200,000 second-feet. Markham 1937 Report, pars. 18, 22, 23.

<sup>35</sup> The additional stretch of levees of the 1914 grade seems to have been in response to the requirement of Section 1 of the Act of May 15, 1928, that "pending completion of any floodway \* \* \* the areas within the same shall be given the same degree of protection as is afforded by levees on the west side of the river contiguous to the levee at the head of said floodway \* \* \*." See General Ferguson, 1938 House Hearings, p. 57.

<sup>36</sup> Markham 1935 Report, pars. 21 (a), 23 24, 43 (2), 43 (3), 43 (4); Sections 1 and 2, Act of June 15, 1936 (Br. 88-89).

floodway; none has yet begun on the Eudora floodway.

Under the existing law the Secretary of War and the Chief of Engineers are authorized to locate the guide-levees, to acquire flowage rights within the floodway, and to construct the spillway and floodway. Act of June 28, 1938, *infra*, pp. 24-25. It may be that, if there were no change in law, they would eventually be under a duty to do so. But Congress apparently does not contemplate immediate construction of the Eudora floodway. Section 12 of the Act of June 15, 1936, joined the Eudora and Morganza floodways, so that construction of neither could be begun alone (*supra*, p. 7). The Act of June 28, 1938, *infra*, p. 24, separated the two floodways, as had been contemplated by the Chief of Engineers in his 1935 report.<sup>37</sup> While couched in discretionary terms, it plainly contemplates immediate construction of the Morganza floodway and more leisurely construction of the Eudora floodway.<sup>38</sup> It provides:

The said Morganza floodway may be initiated and constructed *without delay*; and the

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<sup>37</sup> Markham 1935 Report, pars. 19 (a), 19 (b), 21 (a), 21 (b), 23, 24, 31, 43 (2), 43 (3), 43 (4); Letter of Secretary of War, 1938 Senate Hearings, pp. 5-6.

<sup>38</sup> The successive changes in expression of the two Congressional Committees are significant, although the provision of the bill was the same in each case. The House Committee, while allowing the Chief of Engineers to construct the Morganza first, did not otherwise differentiate between the

United States may, within the discretion of the Chief of Engineers, irrespective of other provisions of law, proceed to the acquisition of flowage rights and flowage easements in the Eudora floodway, and to its construction as authorized by existing law. [Italics added.]

Thus, every flood control project in the alluvial valley of the Mississippi has either been completed or is in the course of construction except the Eudora floodway. The Army engineers still think either that the Eudora floodway is a necessary part of the scheme,<sup>39</sup> or that they cannot yet be sure that it will be unnecessary.<sup>40</sup> However, the taking of options on flowage rights in this area was suspended in May 1938 (1938 Annual Report of Chief of Engineers, pp. 2016, 2087).

two floodways. 1938 House Report, p. 24. The Senate Committee (Senate Report No. 1868, 75th Cong., 3d Sess.), while referring to the House Report for information as to the bill, expressly excepted those paragraphs and substituted the following:

"No objection has been made to the construction of the Morganza floodway. The Morganza floodway is merely supplementary to the East Atchafalaya floodway, and, viewing the Morganza and the East Atchafalaya as one project, it is now 80 percent complete. While the building of either the Morganza or the Eudora is left to the discretion of the Chief of Engineers, the bill contemplates that the Morganza floodway will be initiated and constructed without delay."

<sup>39</sup> Markham 1937 Report, pars. 32, 33; General Schley: 1938 Senate Hearings, p. 33; 1938 House Hearings, pp. 48, 872.

<sup>40</sup> General Ferguson, 1938 House Hearings, pp. 41, 55.

Whether there remains any necessity that the Eudora floodway be constructed, and whether the existing authorization will some day be repealed, depends upon the carrying capacity of the Mississippi River between the Arkansas and Red Rivers. Because respondent relies indiscriminately upon statements as to the capacity of the river in 1928 and at the present time, it will be necessary to make a collation of the estimated capacity at various dates.

8. *The Capacity of the River*.—All of the succeeding estimates are directed toward a fuse-plug levee of 1914 grade in the Arkansas City region. They show that the middle section of the Mississippi River has developed a steadily increasing flood capacity.

1927-1929.—The 1927 flood was not confined; but it is estimated that 2,500,000 cubic feet per second were discharged at the peak below the Arkansas River (*supra*, p. 3). In the 1929 flood, about 1,800,000 second-feet were carried safely down the river (R. 361).

1937.—By this time the levees had generally been raised about 3 feet along the river and cut-offs totaling about 100 miles had been made. The 1937 flood reached a peak of 2,100,000 second-feet, but was carried without overflow, and with a 5-foot lower stage than with the considerably smaller flow during the flood of 1929 (R. 361). The characteristics of floods vary greatly one from the other, so it



is probably unsafe to generalize from the 1937 flood alone." But it is evident that the capacity of the river had markedly increased.

1938.—The estimates of river capacity in 1938 are not uniform; General Schley, Chief of Engineers, tended to be pessimistic, while General Ferguson, President of the Mississippi River Commission tended to be optimistic. But, although General Schley several times refused to accept the latter's estimate and stated his belief that the capacity of the river was not much over 2,000,000 second-feet,<sup>41</sup> the estimates are much closer than this would indicate. The formal estimate of General Schley, as opposed to his impromptu response, was that 2,480,000 second-feet could pass Arkansas City and 2,050,000 second-feet could pass Natchez<sup>42</sup> with a 3-foot freeboard.<sup>43</sup> General Ferguson, on the other hand, testified that the river could carry 2,600,000 second-feet.<sup>44</sup> This estimate, however, did not allow for freeboard on the levees but sought to express the maximum flow which would not overtop the levees in the Arkansas City reach.<sup>45</sup> He had,

<sup>41</sup> General Schley, 1938 House Hearings, p. 18.

<sup>42</sup> 1938 Senate Hearings, p. 27; 1938 House Hearings, pp. 18, 849, 852-853.

<sup>43</sup> Channel work now in progress at Vidalia is expected to reduce the comparative congestion at Natchez (see *infra*, p. 16).

<sup>44</sup> 1938 House Hearings, p. 889.

<sup>45</sup> 1938 Senate Hearings, pp. 40, 50, 52, 55.

<sup>46</sup> 1938 Senate Hearings, p. 53; 1938 House Hearings, p. 54.

however, no doubt but that a flood of the volume of 1927 could be carried in 1938.<sup>47</sup> Since a 3-foot freeboard represents from 200,000 to 300,000 second-feet,<sup>48</sup> the two estimates are in fact reasonably close. With a 3-foot freeboard, then, the river in 1938 could carry over 2,400,000 second-feet at Arkansas City, and 2,050,000 second-feet at Natchez; over 2,600,000 second-feet could go by Arkansas City without overtopping the levee.

194- (?).—The river capacity at the completion of the project cannot accurately be estimated. The following factors, however, will substantially increase its capacity: (a) Setting back the town of Vidalia and increasing the channel depth opposite Natchez, work now in progress, will eliminate the congestion at that point as well as increase the upstream capacity, so that the need for the Eudora floodway to protect the lower river becomes less urgent. (b) Completion of the Morganza floodway and outlet will increase the upstream capacity of the river. (c) Completion of the tributary reservoir projects will reduce the volume of floods, by an extent estimated at 540,000 second-feet (*supra*, pp. 10-11). The combined future effect of these factors cannot well be less than a 500,000 second-feet gain; it may reach 1,000,000 second-feet.

In summary, the river can now carry its greatest recorded flood without overtopping the levees near

<sup>47</sup> 1938 Senate Hearings, pp. 40, 52, 55.

<sup>48</sup> General Ferguson, 1938 Senate Hearings, p. 40; R. 255.

Arkansas City. If the other projects are finished before the Eudora floodway is commenced, the river will carry the "project flood" safely, with a margin of at least 600,000 second-feet over the capacity necessary for the 1927 flood. The successful use of cut-offs and the tributary reservoirs, neither contemplated in the Jadwin plan, may develop into a sufficient substitute for the Eudora floodway. It may be that the floodway will be constructed in any event, to provide protection against all possible contingencies. But it is certain that the respondent's land—as a direct result of the Government's activities—is now receiving flood protection much greater than ever before; indeed, it is a matter of considerable doubt that it will ever again be flooded.

## II

### FLOWAGE RIGHTS IN THE FLOODWAYS

It may be useful to the Court if the statutory and administrative policy with respect to flowage rights in the various floodways were summarized.

1. *Birds Point*.—The 1928 Act called for a setback levee of 1928 grade and a reduction of the existing levee by about 3 feet.<sup>49</sup> This means that the land will have less protection than before, for the floodway will be used in every large flood on the upper Mississippi or the Ohio. Flowage rights must therefore be acquired under Section 4 of the 1928 Act; indeed, after the river levee is reduced,

<sup>49</sup> Jadwin Report, pars. 13, 125.

the Constitution would probably require compensation if they were taken without payment. Purchase of flowage rights for the 130,000 acres in that floodway, at an estimated final cost of \$2,078,000, is virtually complete.<sup>50</sup>

2. *Bonnet Carre*.—This floodway, just above New Orleans, will be used almost as frequently as the Birds Point floodway; it was used in the 1937 flood. There the United States has acquired fee simple title<sup>51</sup> at a cost of \$738,000.<sup>52</sup>

3. *Morganza*.—This floodway will be used less frequently than Birds Point and Bonnet Carre, and more so than the West Atchafalaya or Eudora, since it comes into play whenever there is a flood in the lower river of more than 2,000,000 second-feet (*supra*, p. 7). It includes 60,531 acres.<sup>53</sup> The 1938 Act, *infra*, pp. 24–26, authorizes the Government to acquire flowage rights, and possibly fee simple, over these lands. Acquisition of so-called “comprehensive easements” over the land, at an estimated total cost of about \$1,200,000, is now in progress.

4. *West Atchafalaya*.—This floodway will be used, if required then, only when floods on the lower river exceed 2,500,000 second-feet (*supra*, p. 7). The Government did not construe the 1928 Act as

<sup>50</sup> General Schley, 1938 House Hearings, p. 876; 1938 Annual Report of Chief of Engineers, pp. 2086–2087.

<sup>51</sup> General Ferguson, 1938 House Hearings, p. 61.

<sup>52</sup> General Schley, 1938 House Hearings, p. 879.

<sup>53</sup> General Schley, 1938 House Hearings, p. 877.

directing acquisition of flowage rights in this floodway, since its flood protection had not been diminished. The 1936 Act seems to have been a ratification. (See our main Brief, pp. 73-76.) It was so interpreted by Mr. Whittington, Chairman of the House Committee on Flood Control.<sup>54</sup> However, Section 12 of that Act directed acquisition of flowage rights in the west Atchafalaya basin in the discretion of the Chief of Engineers (Br. —), and the 1938 Act (*infra*, pp. 24, 25) permitted the United States in the discretion of the Chief of Engineers to purchase flowage rights in the lower part of the basin over lands "not subject to frequent overflow." The total cost of flowage rights is estimated at \$1,140,000.<sup>55</sup> Acquisition of flowage rights is now in progress.

5. *Eudora*.—This floodway, as we have shown, may never be used. The 1936 Act, in Section 12 (Br. 92), suspended its construction until the Chief of Engineers had arranged for the purchase of 75 percent of the flowage rights and levee rights-of-way; the 1938 Act (*infra*, p. 24) permits the Chief of Engineers by purchase or condemnation to acquire flowage rights in his discretion and apparently assumes that this will be done. The War Department, therefore, plans to acquire these rights before construction is begun.<sup>56</sup> In 1938 they had

<sup>54</sup> 1938 Senate Hearings, p. 144.

<sup>55</sup> General Schley, 1938 House Hearings, p. 877.

<sup>56</sup> Letter of Secretary of War, 1938 House Hearings, p. 845; General Schley, *ibid.*, p. 869.



secured options on only 29 percent of the land and many of these offers were unreasonably high; further, acquisition of options has been suspended." The appraised value of fee title to the 865,000 acres is \$24,615,000.<sup>57</sup>

Neither the Constitution nor the 1928 Act requires payment for flowage rights in the west Atchafalaya and Eudora floodways. The 1936 Act assumed that "flowage rights" would be purchased, but the Committee reports indicate that this meant any rights for which just compensation would otherwise have to be paid under the Constitution after the taking (See our main brief, p. 76). The 1938 Act gives the Chief of Engineers at least a discretionary authority to acquire the flowage rights before construction of the floodways. If the Eudora floodway is to be constructed, and if the Chief of Engineers decides the Eudora floodway may back up to respondent's land, flowage rights will doubtless be acquired, either by voluntary purchase or through proceedings instituted under Section 4 of the 1928 Act. Then, unless the benefits offset the estimated damage, respondent may expect to receive payment for her flowage rights.

But this, of course, does not aid respondent. She sues under the Tucker Act and the Constitution for an accomplished taking because she is located in the

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<sup>57</sup> General Schley, 1938 Senate Hearings, p. 24; 1938 Annual Report of Chief of Engineers, p. 2087.

<sup>58</sup> General Schley, 1938 House Hearings, p. 856.

abandoned Boeuf floodway. Even if the claim were based on the Eudora floodway, the statutory authority for the Government officers eventually to acquire flowage rights in the Eudora floodway cannot impose a liability on the United States in a suit brought under the Tucker Act, long in advance of construction of the floodway, for an alleged taking of flowage rights over land which has in fact been given greatly increased flood protection.

### III

#### RELEVANCE OF THE CUT-OFF WORK

In our main brief we mistook an argument of the respondent in the lower court and demonstrated that, even if the added flood protection from the levees on the south bank of the Arkansas River were not a part of the 1928 plan, the Government could still rely on this related work to show there had been no taking (p. 49). In fact, those levees were a part of the plan from the outset. Jadwin Report, pars. 16, 129. Respondent's objection is in truth directed to the cut-off work in the main channel (pp. 192-209, 403-405).

As explained above (pp. 8-9), the cut-off work was not recommended in the Jadwin Report. Experimental work, however, proved so successful that it is now a major factor in the flood control program. The work could be viewed as authorized in 1928 under the general authority to engage in "channel stabilization and river regulation." Jad-

win Report, par. 131. And any lack of authority has amply been cured by subsequent Congressional ratification.. Markham 1935 Report, pars. 10, 191 (d), 21 (f), 34, 35, 43 (9); Section I of Act of June 15, 1936 (Br. 88); Markham 1937 Report, par. 36; Section 1 of Act of June 28, 1938, *infra*, p. 23.

And, of course, even if the work were neither authorized nor ratified, respondent hardly could show that her land receives less flood protection, or that her flowage rights were taken, simply because the Government's benefits were conferred upon her land without adequate statutory authority.

#### CONCLUSION

For these additional reasons it is, therefore, respectfully submitted that the decision of the court below should be reversed.

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OCTOBER, 1939.

## APPENDIX

The Act of June 28, 1938, c. 795, 52 Stat. 1215, provides in part:

SEC. 4. That the following works of improvement for the benefit of navigation and the control of destructive floodwaters and other purposes are hereby adopted and authorized to be prosecuted under the direction of the Secretary of War and supervision of the Chief of Engineers in accordance with the plans in the respective reports hereinafter designated: \* \* \*

### LOWER MISSISSIPPI RIVER

That in accordance with the recommendations of the Chief of Engineers, as set forth in his report of April 6, 1937, and published as Flood Control Committee Document Numbered 1, Seventy-fifth Congress, first session, paragraph 38 (b), except subparagraph (1), the project for flood control of the Lower Mississippi River adopted by the Act of May 15, 1928, as amended by the Act of June 15, 1936, as amended, is hereby modified and, as modified, is hereby adopted, and there is hereby authorized to be appropriated in addition to the sums previously authorized \$40,000,000 to be applied for the purposes set forth in said document covering the said recommendations, with the exceptions mentioned, subject to the provisions hereinafter made.

That the Flood Control Act of June 15, 1936, as amended, is amended as follows:

"The United States may, within the discretion of the Chief of Engineers, irrespective of other provisions of law, proceed to acquire all easements needed and of the character considered advisable in the Morganza floodway and to construct said Morganza floodway. Said Morganza floodway may, within the discretion of the Chief of Engineers, be modified as to its design and inflow.

"The said Morganza floodway, may be initiated and constructed without delay; and the United States may, within the discretion of the Chief of Engineers, irrespective of other provisions of law, proceed to the acquisition of flowage rights and flowage easements in the Eudora floodway, and to its construction as authorized by existing law: *Provided*, That the intakes of such Eudora floodway shall include an automatic masonry weir with its sill at such an elevation that it will not be overtopped by stages other than those capable of producing a stage of fifty-one feet or over on the Vicksburg gage: *Provided further*, That a fuseplug levee loop may be constructed behind said sill to prevent flow into the floodway until the predicted flood exceeds the safe capacity of the main river leveed channel, with a free-board of at least three feet, but said fuseplug levee may be artificially breached when in the opinion of the Chief of Engineers such breaching is advisable to insure the safety of the main river controlling levee line: *Provided further*, That the authority to acquire lands, flowage rights, and easements for floodways shall be confined to the floodways proper and



to the northward extension of Eudora: *Provided further*, That within the discretion of the Chief of Engineers, the guide line levees of the Eudora floodway may be extended south toward Old River: *Provided further*, That the Chief of Engineers is hereby authorized to construct the said Eudora floodway at such location as he may determine, in the vicinity of Eudora. The United States may, within the discretion of the Chief of Engineers irrespective of other provisions of law, proceed to acquire flowage rights and flowage easements in the northward extension of the Eudora floodway, as authorized by existing law, provided that pending the completion of such northward extension all the Riverside fuseplug levee extending south from the vicinity of Yancopin to the vicinity of Vau Cluse, Arkansas, and so as to connect with the existing levee of 1928 grade and section, shall be reconstructed to the 1914 grade and 1928 section: *Provided further*, That if the back protection levee is constructed prior to the construction of Eudora floodway, it shall be connected with the main Mississippi River levee and subsequently connected with the Eudora floodway when constructed: *Provided further*, That the Chief of Engineers is authorized, in his discretion, to negotiate options, make agreements and offers with respect to lands, flowage rights, easements, and rights-of-way involved, as provided by law, at prices deemed reasonable by him.

“The United States, irrespective of other provisions of law, may, within the discretion of the Chief of Engineers, acquire flowage easements over all lands not subject to frequent overflow in the Atchafalaya Basin below the latitude of Krotz Springs.

"Said Morganza floodway shall not be operated until the Wax Lake outlet has been put into operative condition.

"The fuseplug levees at the head of the Atchafalaya Basin on the east side of the Atchafalaya River shall be reconstructed to the 1928 grade and section.

"The United States may, in the discretion of the Chief of Engineers, acquire all flowage rights, flowage easements, rights-of-way for levee foundations, and titles in fee simple as herein provided, either by voluntary acquisition or in accordance with the condemnation proceedings by the Secretary of War as provided for in section 4 of the Flood Control Act of May 15, 1928.

"In the event the United States acquires or owns title to any lands in fee simple under the provisions of the Act of May 15, 1928, as amended and supplemented, the United States may retain the ownership thereof, or any part thereof instead of turning over such lands to the ownership of States or local interests as provided in section 4 of said Act of May 15, 1928, and may lease such lands: *Provided*, That 25 per centum of all moneys received and deposited in the Treasury of the United States during any fiscal year on account of such leases shall be paid, at the end of such year, by the Secretary of the Treasury to the State in which such property is situated, to be expended as the State legislature may prescribe for the benefit of the public schools and public roads of the county or counties in which such property is situated: *Provided further*, That when such property is situated in more than one State or county the distributive share to each from the proceeds

of such property shall be proportional to its area therein: *Provided further*, That no part of the appropriations herein or heretofore authorized for said Morganza and Eudora floodways and extension shall be used for any other purpose."

Except as herein amended, the Act of May 15, 1928, as amended by the Act of June 15, 1936, as amended, shall remain in full force and effect.



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No. 72

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1939

UNITED STATES OF AMERICA.....*Petitioner,*

v.

MRS. JULIA CAROLINE SPONENBARGER, ET AL.....*Respondents.*

**CERTIORARI TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE EIGHTH CIRCUIT**

**BRIEF FOR RESPONDENT MRS. JULIA CAROLINE  
SPONENBARGER**

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No. 72

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1939

UNITED STATES OF AMERICA.....*Petitioner,*

v.

MRS. JULIA CAROLINE SPONENBARGER, ET AL.

**CERTIORARI TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE EIGHTH CIRCUIT**

**BRIEF FOR RESPONDENT MRS. JULIA CAROLINE  
SPONENBARGER**

**STATEMENT OF THE CASE.**

This action was instituted by respondent Mrs. Julia Caroline Sponenbarger under the Tucker Act, 28 U. S. C. A., Sec. 41 (20), for compensation required by the Fifth Amendment for the taking of her property for public use. Respondent owns forty acres of cultivated land in Desha County, Arkansas, the fair-market value of which was reduced from \$5,000 to \$1,000 as the direct, proximate, and predetermined result of the establishment of the Boeuf

Floodway under authority of the Flood Control Act of May 15, 1928. 33 U. S. C. A., Sec. 702a, 702b-702d, 702e-702g, 702h-702j, 702k, 702l, 702m; Public No. 391, 70th Congress.

Respondent's 40 acres of land lies at the head or intake of said floodway, about one mile inland midway between the northern and southern extremities of the fuse plug levee hereinafter described (R. 395, 159, 160, 163, 167, 250).

The answer of petitioner denied (1) that the enactment of the Flood Control act created any express or implied obligation to compensate respondent, and that any act of the government done under authority of the statute constituted a taking of respondent's property; and (2) asserted that the Boeuf Floodway had by a subsequent act of Congress (June 15, 1936; 33 U. S. C. A., Secs. 702a-1 to 702a-10, Public No. 678—74th Congress) been abandoned and the Eudora floodway substituted in lieu thereof (R. 18, 77, 377).

The prime and fundamental issue in this action is purely one of law, viz: Do the established facts constitute a "taking" of respondent's property by the United States for use in a floodway as the result of the construction work done on the flood control project authorized by the Flood Control Act of May 15, 1928? Secondarily: If so, what "just compensation" shall be awarded under the provisions of the Fifth Constitutional Amendment?

The case cannot well be clearly stated more concisely than is done in respondent's original Petition filed August 11, 1934 (R. 4-16; R. 310, par. 40).

The full force of the issues to be decided will not be fully or fairly apprehended until each of respondent's de-



tailed requests for Findings of Fact and Conclusions of Law have been considered, tested by the record and applied (R. 298-350). The most vital and decisive of these requests are based on uncontradicted facts, refer to indisputable public records, or are self-evident to the mind replete with the record facts involved.

Judicial statements of the physical facts involved are found in the following opinions: *Kincaid v. United States*, 35 F. (2d) 235; *Kincaid v. United States*, 37 F. (2d) 602; *United States v. Kincaid*, 49 F. (2d) 768; *Hurley v. Kincaid* 285 U. S. 95, 52 S. Ct. 267, 76 L. ed. 637; (R. 11-12; R. 310, par. 41).

This is a test case to settle the issue of law involved (R. 217-219). In each of the Court of Claims cases (R. 218-219), after exhaustive printed and oral arguments, the defendant's demurrers on the issue of legal liability have been repeatedly overruled. So also did the late District Judge Martineau in the lower court overrule the petitioner's demurrer in this case, ruling that the only question for trial was the amount of compensation; that is, the amount of respondent's damage, if any (R. 18, and appendix A this brief). Notwithstanding the overwhelming proof of every material allegation of respondent's Petition (R. 4-16), every material premise of fact being without substantial contradiction, after an extensive, expensive trial Judge Martineau was reversed by the final judgment of the District Court (R. 376-390). If the conclusions of District Judge Davis (R. 376-390) are correct petitioner's demurrer should have been sustained in this case, as well as in all the cases pending in the Court of Claims. He was properly reversed by the Circuit Court of Appeals. *Sponenbarger et al v. United States*, 101 F. (2d) 506.

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The disastrous flood of 1927 for the first time shocked the Nation and the Congress of the United States into recognition and *assumption of national responsibility* for the flood control of the Mississippi River (See Point V, B, 2). Following a trip of personal inspection of that national catastrophe, Secretary Herbert Hoover referred to it as "our greatest peace-time disaster." President Coolidge, in his message to Congress, declared: "Flood control is a *national problem*. Its recurrence *must* be forever prevented."

After prolonged and exhaustive hearings by the appropriate committees, the Congress by the passage of the Flood Control Act of May 15, 1928 (Public—No. 391—70th Congress), adopted, and enacted into law, "*the engineering plan* set forth and recommended," in House Document No. 90, 70th Congress, 1st session, commonly called the Jadwin Plan in honor of its author, the then Chief of Engineers, Major General Edgar Jadwin (R. 118-126). Many recommendations of economic policy, as, for instance, the requirement of local contribution to cost and damage (Doc. 90, paragraphs 147 and 25 to 42, inclusive), were expressly rejected by the Congress (Secs. 2 and 4 of Act of May 15, 1928). "The engineering plan" was adopted *in toto* (Sec. 1 of Act).

This *engineering plan* was, and is, *one*, single, entire indivisible, complete, comprehensive plan and project for the flood control of the entire alluvial valley of the Mississippi River extending from Cape Girardeau, Missouri, to the Head of Passes at the mouth of the river (Sec. 1 of the Act; Doc. 90, Secs. 1-2; R. 118-121). See Point II this brief.

Furthermore, after the Report of the special Board on August 8, 1928, as required by Section 1 of the Act (Com. Doc. No. 28, House of Representatives, 70th Congress, 2d Session; R. 127), and the action of the President thereon on August 13, 1928 (R. 128), this engineering plan became "the legal project to be executed in accordance with the law." As further stated by Attorney General Mitchell: "Nowhere in the act does it appear that any latitude whatever is permitted with respect to the project covered by the act, save and except as is provided for in connection with the recommendations of the special board and the decision of the President thereunder. As pointed out heretofore the board having acted and completed its duties and the President having made his decision upon such recommendation of such special board, and such decision having been acted upon to a greater or less extent by the officers in charge of the project, it would seem that the project covered by the act has now become *fixed and definite* with no power of modification or change, except as provided in the project itself, by any authority save the Congress. . . . *this project is fixed and not subject to review or change by this administration.*" (Com. Doc. No. 2, 71st Congress, 1st Session, July 19, 1929, "Opinion of the Attorney General," at pp. 15 and 16; R. 127-129; *Sponenbarger v. United States*, 101 F. (2d) 506 at p. 508). Therefore, Petitioner falls into fundamental error by urging that "the Jadwin Plan was only tentative and general in character—a mere outline of flood control in the alluvial valley of the Mississippi River" (Petition for Certiorari, p. 6). As a matter of fact, as well as law, after August 13, 1928, (R. 128) the Plan became both *definite and fixed*.

The Plan recognizes the engineering impossibility of building levees sufficiently high to carry within the main channel of the Mississippi River a flood of the proportions of the 1927 flood, to say nothing of possible floods 33-1/3% larger (R. 161-162). Therefore the plan of flood control by levees only, which had been advocated by the Mississippi River Commission since 1879 (Doc. 90, Secs. 80 and 3; R. 122 and 119), was definitely abandoned by the Congress. Instead, the present law provides for the confinement of floods as far as practicable within the main stem of the Mississippi River by a uniform system of levees only *to their safe carrying capacity*. These levees in flood times cannot possibly carry the enormous volumes of surface water which gather from the vast drainage basin of the Mississippi River shown at R. 391. No other river in the world is comparable to it. The basin includes all or portions of 31 States and about 20,000 square miles of Canada. This great Father of Waters and its tributaries drain an area of 1,240,000 square miles, or approximately 41% of the continental United States. It reaches from the Appalachian Mountains on the east to the Rocky Mountains on the west. Its extremities are respectively in western New York, western Montana, western Canada 70 miles north of the northern boundary of Montana, and southern Louisiana. The only rivers approaching this in length are the Nile and the Amazon, the estimated length of each being about 4,000 miles. The total length of the navigable waterway of the Mississippi River and its tributaries is estimated at 15,000 miles (Doc. 90, Secs. 43-50; Report of Mississippi River Commission, House Com. Doc. 1, 70th Congress, 1st Session, p. 4, Sec. 15).



The Flood Control Act of May 15, 1928, is designed to take care of a project flood of approximately 3,000,000 cubic second feet of water in the vicinity of Arkansas City (R. 162). In 1927 approximately 1,200,000 cubic feet per second came into the Mississippi River at the mouth of the Arkansas River, above Arkansas City, and the fuse plug levee. Approximately 2,000,000 cubic second feet came out of the Ohio River to the mouth of the Arkansas River in 1937 (R. 245). Levees below the mouth of the Arkansas River cannot be constructed high enough and strong enough to carry this enormous volume of approximately 3,000,000 cubic feet per second of water. "I can consent to nothing that increases substantially the flow of water below the fuse plug beyond 1,850,000 second-feet, because it courts disaster—we do not dare to permit this water to pass that fuse plug" (Chief of Engineers Markham in 1934, R. 141). Therefore when a flood of approximately 3,000,000 cubic second feet of water reaches the vicinity of the fuse plug levee, just below the mouth of the Arkansas River, since the levees below will not safely carry more than approximately 2,000,000 cubic second feet, "over a million feet has to go out of there whether anybody likes it or not."\*\*\* "I repeat that a million second-feet *must* be taken out of that river unless you are going to have more and more disaster.\*\*\* That is pretty nearly 6 times all the water that flows over Niagara Falls" (Chief of Engineers Markham, R. 140-141 and, in 1936, R. 145-146 and 143). This enormous excess of flood water "*must be spilled* through safety valves when the volume exceeds the safe capacity of the river" (Doc. 90, Sec. 97, R. 123). "To *insure* that excess water will leave the main river, a fuse plug section of the levee in the vicinity of Cypress

Creek must be kept at its present strength and at its present grade, viz., 3 feet below the new levee grade. This relatively weak section will be long enough to discharge the greatest predicted possible excess water over and above the capacity of the leveed river below" (Doc. 90, Sec. 118, R. 124). To further insure this designed result, an inspection of the map of the Jadwin Plan as prepared by the Army Engineers, and as actually constructed, will disclose that just below the mouth of the Arkansas River the enormous volume of flood waters which come from the entire drainage basin of the Mississippi River with all of its tributaries (R. 391) is actually gathered together by levee-lines in such a way as to violently funnel the entire flood directly against the fuse plug levee. At the mouth of the Arkansas and White Rivers the levee lines of the Mississippi River are from 12 to 14 miles apart. The greatest width of the channel of the Mississippi River in the reach between Arkansas River and Red River is a point 14 miles below the mouth of the Arkansas River in the latitude of the fuse plug levee, above the bottle-neck (Vol. 1 "Mississippi River Flood Control and Navigation" published by the United States Waterways Experiment Station of the War Department, Corps of Engineers, U. S. Army, May 1, 1932, at p. 40). When the flood waters of the White and Arkansas Rivers have been poured into those of the Mississippi River beyond the safe capacity of the levees below to carry, the levee lines are rapidly constricted so as to form a "bottle-neck" about the middle of the fuse plug levee, in the vicinity of Arkansas City, approximately 1 mile wide. Not only so, but the levees on the East side of the Mississippi River will be seen to curve sharply and extend due West so as to throw the entire force of the flood

squarely against the weak fuse plug levee immediately North of Arkansas City, *insuring* the absolute destruction of respondent's property when the fuse plug levee functions as designed. See also R. 11 and 395. When respondent's suit was filed "the weakest point of the fuse plug levee, which would most likely crevasse under the stress of a flood, was in the vicinity of Cypress Point revetment, about 2 to 3 miles North of *the bottle-neck in the vicinity of Arkansas City*. A bottle-neck means where the levee lines are very close together constricting the floodway width of the river to an extreme amount as compared with the width above and below" (R. 158). "Any flood coming out of the White and Arkansas Rivers joining with that of the upper Mississippi that can safely pass through the constricted channel of the Mississippi River known as the bottle-neck near Arkansas City can be safely carried through the widened channel South of the bottle-neck and past the fuse plug levee. The fuse plug levee would crevasse, if at all, in the upper portion of the fuse plug levee before reaching the bottle-neck (R. 165).

Therefore, the fundamental difference, the vital key-stone and very heart of the Jadwin Plan, the present *law*, is to *artificially* and *certainly* protect the levee system, and most of the alluvial valley, by diverting all surplus water in excess of the safe carrying capacity of the main river through lateral *floodways* into auxiliary channels, the principal one in the critical mid-section of the river being the Boeuf Floodway (Doc. 90, Sec. 3, R. 119; Com. Doc. 1, 74th Congress, p. 21, par. 17, R. 144). This had never been done before.

The Boeuf Floodway may be considered as "a separate and independent project provided for by the 1928

insinuation that respondent's land was in a swamp, unreclaimed area. The ring-levee has not been constructed around Arkansas City to take it from the floor of the Boeuf Floodway, and its industries, commerce and schools have now been completely paralyzed by Federal law, including respondent's land (R. 187).

Petitioner erroneously states that "the land lies in the basin of the Boeuf River, which rises in the northern part of Desha County" (p. 3 of Petition for Certiorari). An examination of any of the accurate maps will show that the Boeuf River rises far to the South of respondent's land, rising in the northern part of Chicot County—not Desha. The northern part of Desha County naturally drained into the Mississippi River through Cypress Creek North of Arkansas City and South through Boggy Bayou into Chicot County. Only by an engineering northern extension of Boeuf Basin by the flood control works constructed under the 1928 Act has respondent's land been placed therein. Her property, therefore, is not now "a *natural* floodway" but rather an "*artificial* floodway" created by petitioner.

It is thus clear that respondent's land has never before been overflowed "by reason of *DIVERSIONS from the main channel of the Mississippi River*" (1928 Act, Sec. 4, R. 119), and all future floodings will be the result of an entirely different hazard, artificially and intentionally created by the United States, pouring over respondent's land an enormous volume of "additional destructive flood waters" in a manner and from a place never before experienced (R. 159, 163, 171, 177, 178).

This impresses upon respondent's land an easement, and a certain *public servitude* for the general welfare,

for which she must be compensated. A definite part of her "property" has been "taken."

The petitioner United States, speaking by its only constitutionally authorized voice, the Congress, realizing that *for the first time in the history of the nation* it was assuming its just national responsibility in the premises, expressly admitted its constitutional liability to the property owners of these floodways, and intended beyond question to make the compensation required by the Fifth Amendment which provides: "Nor shall private property be taken for public use, without just compensation." See Sec. 4 of 1928 Act (R. 119). See Point V, B, 2, this Brief.

Immediately preceding the passage of the Act, and at the moment when the Conference Report on the bill was being agreed to, the Congress was advised by Chairman Reid of the House Flood Control Committee that the passage of the act, with the express provisions of Section 4, would definitely create the right to maintain *such an action as respondent's present suit*, as is evidenced by the following excerpt from the Congressional Record:

"Mr. BOX. The gentleman provides additional damages done by reason of the increased flow, as I understand it. How will such damages be ascertained?"

"Mr. REID of Illinois. There is no method provided under the bill.

"Mr. BOX. *Will they have the right to proceed in court for the collection of such damages?*

"Mr. REID of Illinois: *This is the first time that any right has been recognized on the part of the individual owner against the Government for any flood-control damages.*



1. The construction of a series of experimental CUT-OFFS by petitioner, an idea which originated in 1932, some three years after respondent had sustained her loss (R. 265); and

2. Respondent's loss was a part of the general economic DEPRESSION which began in 1930; and

3. Respondent's loss was occasioned by the heavy TAX BURDEN on her land which existed at the time of, and prior to, her purchase of the land on January 20, 1927 (R. 179).

Each of these alleged defenses will be refuted under appropriate Points hereinafter argued.

The lower court based his conclusion that there was no "taking" on four erroneous premises, viz:

1. Because there was no "physical invasion" of respondent's land,

2. Because Boeuf Floodway "is not now, and never has been, in an operative condition."

3. Because Boeuf Floodway has been *abandoned* and

4. That respondent's loss of \$4,000 in market value is *consequential—damnum absque injuria* (R. 376-390; *Sponenbarger v. United States*, 21 F. Supp. 28).

The error of each of these premises which led the district court to a false conclusion will be hereinafter made manifest under the appropriate headings. Here let it suffice to point out:

(1) That the Act itself prohibits the payment of *damages* from physical invasion. Sec. 3 provides: "No liability

of any kind shall attach to or rest upon the United States for any *damage* from or by flood waters at any place." This is in conformity to the general rule of law existing when the act was passed. See *Cubbins v. Mississippi River Commission*, 241 U. S. 351, 36 S. Ct. 671, 60 L. ed. 1041; *Jackson v. United States*, 230 U. S. 1, 33 S. Ct. 1011, 57 L. ed. 1363; *Hughes v. United States*, 230 U. S. 24, 33 S. Ct. 1019, 57 L. ed. 1374; etc. The present action does *not* sound in tort for *damages* (R. 5). It is founded upon contract for a "*taking*" within the protection of the Fifth Amendment (R. 5; 28 U. S. C. A., Sec. 41 (20)).

(2) That the undisputed testimony even from petitioner's own witnesses is that the fuse plug spillway is, and for a long time has been, operative (R. 247, 248, 250). This is an indubitable, visible, physical FACT.

(3) That not only has the Boeuf Floodway *never* been *abandoned*; but Congress actually and expressly ratified its use for an indefinite period of time in the future by Sec. 2 of the Flood Control Act of June 15, 1936 (R. 154, 258). This was long after the filing of respondent's present action in 1934, and still longer after petitioner had "*taken*" respondent's property. This action must be adjudicated as of the time of the taking, and certainly not later than the date suit was filed, August 11, 1934 (R. 16).

There is *not yet any* assurance that the Boeuf Floodway will *ever* be abandoned (R. 154-155). Petitioner admits that: "There has been no preparation to carry out the construction authorized by the Overton Bill. . . . The Markham Plan (Eudora Floodway), authorized by the Overton Bill, so far is nothing but a paper plan, an optional plan. I cannot say whether it will ever be executed. Even the

"Mr. BOX. And does the gentleman believe we will have the right to proceed in court for the collection of such damage without the permission of Congress hereafter?

"Mr. REID of Illinois. I think it *creates a right*, and I presume every right in court follows the creation of that right." 69 Cong. Rec., Part 8, p. 8123.

Hence judicial decisions not involving the Flood Control Act of May 15, 1928, are inapposite. No authorities prior to May 15, 1928, can throw any real light on the legal issue of liability in this case, and may tend only to confuse the issue.

The "taking" of respondent's property was effected and completed by the following overt acts by the petitioner:

1. Passage of the Flood Control Act of May 15, 1928 (R. 118); followed by
2. The President's proclamation of August 13, 1928 (R. 128); followed by
3. The President's proclamation of January 10, 1929 (R. 128); followed by
4. Condemnation suit in Boeuf Floodway filed July 1, 1929 (R. 129); followed by
5. The issuance of an *Injunction* July 1, 1929, prohibiting "all persons," including respondent, from interfering in any way with the *full possession of the United States* (R. 129-130), which suit was not dismissed and which injunction was not dissolved until December 18, 1934, long after respondent had filed her present action (R. 130); and by
6. Petitioner assuming control of the fuse plug levee as a spillway essential to the Jadwin Plan, thereby depriv-

ing respondent of her inherent right to defend her property from the flood waters of the Mississippi River (Doc. 90, Sec. 120, R. 124; 1928 Act, Secs. 1 and 9, R. 118-119); and by

7. The actual construction work done by petitioner under authority of the 1928 Act making the fuse plug levee operative, and converting it into a spillway as it was designed to function by the Jadwin Plan. Work on the project began immediately after the passage of the Act (R. 244; see *Hurley v. Kincaid*, 285 U. S. 95, 52 S. Ct. 267, 76 L. ed. 637), and the fuse plug levee has been potentially operative as a safety valve or relief levee (Doc. 90, Secs. 97, 134; R. 123) since approximately 1932 (R. Neptune 157-159, Wonson 167-168, Simons 175, Mathis 244, 246, 247, 249, 251).

By its *pleadings* petitioner offered as its defense pure conclusions and issues of *law*, to-wit:

1. Conclusion of counsel that the foregoing acts do not constitute a taking of respondent's property (R. 377)—a general denial (R. 18 and 77); and

2. That the Boeuf Floodway was abandoned by the passage of the Flood Control Act of June 15, 1936, (R. 79 and 377, refuted by R. 258), approximately two years after respondent had filed her present action; and

3. That any loss of market value sustained by respondent was *consequential damages* (*damnum absque injuria*) (R. 80).

The *testimony* offered by petitioner did not go squarely to the issue of liability, but was rather addressed to an issue not made by the pleadings, viz., *mitigation of damages* by

details of the plan have not yet been worked out much less approved by the higher authorities" (R. 258): *The Jadwin Plan as adopted by the Flood Control Act of 1928, has not yet been actually, physically changed.* There has been no appropriation for the mere authorization of the Overton Bill. The plan of the Overton Bill (Markham Plan of the Act of June 15, 1936), cannot, by its own terms, become effective until flowage rights have been acquired within a definite limit and that has not yet been done. *The only plan under actual construction is that authorized by the Flood Control Act of May 15, 1928.* That is the actual, physical plan which is on the ground" (R. 247).

The District Judge referred to the fact that the present action is not a condemnation suit (R. 386). This is wholly immaterial. "The fact that condemnation proceedings were not instituted and that the right was asserted in suits by the owners *did not change the essential nature of the claim.*" *Jacobs v. United States*, 290 U. S. 13, 54 S. Ct. 26, 78 L. ed. 142, 143, 96 A. L. R. 1, at p. 3.

The entire record on the foregoing issues, when clearly and correctly apprehended, required a reversal of the District Court, which erred in refusing respondent's requested Finding of Fact No. 101 (R. 334) and Conclusions of Law Nos. 61-62 (R. 350) and 24 (R. 339). The findings of the Circuit Court of Appeals (*Sponenbarger et al v. United States*, 101 F. (2d) 506) are based on undisputable physical facts and unimpeachable public records. Its reasoning is sound and its conclusions inescapable. Its judgment, we respectfully submit, should be affirmed.

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## STATEMENT OF POINTS URGED

## POINT I.

**The Documentary Evidence introduced is competent and CONCLUSIVE.**

This Point covers Assignments of Error Nos. 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 28, 30, 31, 32, 33, 35, 47, 82, 96, and 131 (R. 99-106).

Cases and statutes referred to in the argument, in the order cited, are:

*Title 33 U. S. C. A.*, secs. 641, 647, 648, 701, 702.

*United States v. Pfitsch*, 256 U. S. 547, 41 S. Ct. 569, 65 L. ed. 1084.

*Jennison v. Kirk*, 98 U. S. 453, 25 L. ed. 240.

*Church of the Holy Trinity v. United States*, 143 U. S. 457, 12 S. Ct. 511, 36 L. ed. 226.

*Edwards v. Darby*, 12 Wheat. 206, 6 L. ed. 603.

*Boston Sand & Gravel Company v. United States*, 278 U. S. 41, 49 S. Ct. 52, 73 L. ed. 170.

*Duplex Printing Press Company v. Deering*, 254 U. S. 443, 41 S. Ct. 172, 65 L. ed. 349.

*United States v. Butler, etc. Hoosac Mills Corporation*, 297 U. S. 1, 56 S. Ct. 312, 80 L. ed. 477.

*Wright v. Mountain Trust Bank*, 300 U. S. 440, 57 S. Ct. 556, 81 L. ed. 736.

*Savage v. United States*, 1 Ct. Cls. 170.

*Title 28 U. S. C. A.*, sec. 272.

*Arizona v. California*, 283 U. S. 423, 51 S. Ct. 522, 75 L. ed. 1154.

*Thornton v. United States*, 271 U. S. 414, 46 S. Ct. 585, 70 L. ed. 1013.

23 *Corpus Juris*, sec. 1901, p. 102.

*Tempel v. United States*, 248 U. S. 121, 39 S. Ct. 56, 63 L. ed. 162.

*The Apollon*, 9 Wheat. 362, 6 L. ed. 111.

ways may be either controlled or uncontrolled. In the latter type they become operative as soon as the main stream passes above its banks, and remain operative until flood stages have passed. In the former type, the head of the floodway is closed by a structure which prevents operation until the safe capacity of the main river flood channel has been exceeded. When this stage is reached, the floodway takes off the excess flood waters. The structure at the floodway head may be a fixed or moveable weir. In both types, flow down the floodway ceases as soon as the main river stages fall below weir crest elevation. The closing structure may, on the other hand, be *an earthen dike or levee designed to crevasse when dangerous flood stages are reached*. Such a dike is known as a *fuse plug*. After rupture of a fuse plug, flow down the floodway continues until flood stages cease on the main river. Objection is advanced to the fuse plug on the ground that a seasoned levee cannot always be relied upon to crevasse to such an extent and with sufficient rapidity to accommodate the entire excess flood discharge. This criticism springs from an *incomplete concept of proper fuse plug design*. The elevation of the fuse plug crest must be such that it will be overtopped *before the safe capacity of the river flood channel is exceeded*. *Overtopping is always followed by a crevasse which will lower main river stages at and above the fuse plug*. Should this crevasse be insufficient to accommodate the entire excess flow, rising main river stages will again overtop the fuse plug and the process will be repeated" (Vol. II Mississippi River Flood Control and Navigation by U. S. Army Engineers, War Department, Waterways Experiment Station, Vicksburg, Mississippi, May 1, 1932, at pp. 291-292).

This levee converted into a "fuse plug" by the 1928 Act was originally constructed by the local property owners and was completed by the Southeast Arkansas Levee District in 1921 to the then standard grade and section recommended by the Mississippi River Commission, giving the area behind it equal chances and protection with all other areas in the alluvial valley (R. 174, 184, 131-132). This levee has successfully withstood every flood since 1921, and when the 1928 Act was passed was successfully protecting respondent's land from all flood waters from the main channel of the Mississippi River (R. 161, 170, 174, 278). In 1927 the land was under water from crevasses in the *Arkansas River* levee 35 miles away (R. 163); but such inundations, rising slowly and without current, were not destructive. On the contrary such character of occasional flooding is by many considered beneficial (McGehee, R. 221; Farrell, R. 225). In fact, the entire alluvial valley was so built.

The historical fact which years ago created market values in this vicinity, constantly increasing till the passage of the Flood Control Act of May 15, 1928, and existing at the time of respondent's purchase of her property, was the *confident, assured, justified* expectation of speedy and ultimate complete protection against the floodwaters of the Mississippi River, equal to that enjoyed by any other protected area in the Middle Section of the river. For many years these property owners in the Boeuf Floodway had been taxing themselves, and issuing bonds secured by a lien against their property, for the purpose of building levees along the main stem of the Mississippi River and up the south bank of the Arkansas River to protect their property. This section of the levee now known as "the fuse plug" was

so built. It was completed by the closing of the last gap in the levee at Cypress Creek in 1921 (R. 184, 173-174), and has never since either been overtopped or crevassed. Respondent's property was finally absolutely safe against attack by floodwaters from the Mississippi River. The petitioner itself, speaking through its Chief of Engineers, *assured* the property owners that the closure of this gap *would give absolute flood protection in succeeding years* (R. 171).

Because of the steady progress of this program, prior periodic floodings of respondent's land had had no substantial effect on market values in that vicinity (R. 183, 184-185, 191, 196, 203, 221). On the contrary, for many years, as the work of levee building progressed, market values in this vicinity steadily increased. When it was finally assured that the levee line across the outlet of Cypress Creek into the Mississippi River would be built, this confident, assured, *justified* expectation of speedy and ultimate equal and complete flood protection was largely responsible for the high market values prevailing in the vicinity at the time of respondent's purchase of her land in 1927.

Respondent's property is now fully protected from any future flooding from the Arkansas River (R. 159, 168, 170, 147-148), the source from which the water last reached respondent's property in 1927—and *this independent of the 1928 Act* (Petition for Certiorari this case at p. 7; R. 362, par. 35). The River and Harbor Act of July 27, 1916, extended the jurisdiction of the Mississippi River Commission for a distance of about 92 miles up the Arkansas River to the Lincoln-Jefferson County line. This extension of jurisdiction was to permit certain necessary levee construction to enable the Commission to raise levee grades to the limit

of the effect of Mississippi backwater upon these levee lines. The extension of the main river levee line had so raised the main river flood plane that the backwater effects were gradually extended farther and farther up the tributaries (Vol. I Mississippi Flood Control and Navigation by U. S. Army Engineers, War Department, Waterways Experiment Station, Vicksburg, Mississippi, May 1, 1932, at p. 18).

Therefore, as the result of the persistent efforts by the individual property owners in this area for a generation, and at enormous expense resulting in heavy, bonded indebtedness against their lands, respondent's land would NOW enjoy *complete* flood protection but for the Flood Control Act of May 15, 1928.

Petitioner stresses the fact that respondent's land has been repeatedly overflowed by deep high water in the past, as in the years 1912, 1913, 1919, 1921, 1922, and 1927, urging that all property in this vicinity lies in the natural high-water bed of the river and was always subject to the servitude of flooding (Petition for Certiorari at pp. 3 and 9). The inference sought is entirely unjustified by the physical facts. This particular vicinity has been highly developed both agriculturally, industrially and commercially for many years (R. 183). Respondent's land lies on the outskirts of Arkansas City, the county seat of Desha County, which was a thriving business and industrial center in the days when Mark Twain piloted palatial passenger steamboats on the Mississippi River. The court house for all this county remains at Arkansas City. The importance of the community is recognized in the Jadwin Plan itself by the provision that a ring-levee shall be constructed around Arkansas City (Doc. 90, Sec. 118, R. 124). This refutes the



Act" (Petition for Certiorari, p. 8), in the same sense that the lungs are separate and independent organs of the human body. The Jadwin Plan would be as complete without the Boeuf Floodway as would an automobile without a carburetor. The *floodways* are as essential parts of the Jadwin Plan as are the vital organs of the human body essential to life. Without the *floodways*, and especially the Boeuf Floodway in the critical mid-section of the river, there would be no Jadwin Plan. Until the fuse plug levee began to function as a spillway the comprehensive Jadwin Plan was ineffective. As stated by the Circuit Court of Appeals, "this comprehensive plan binds together the lands on both sides of the river as parts of the same section of the alluvial valley." *Sponenbarger v. United States*, 101 F. (2d) 506, at p. 512.

When the case was tried below the actual construction of the plan had been substantially completed (R. 142-143, 147-148, 167), and was approximately 80% complete when appellant filed her case in 1934, the fuse plug levee at the entrance of the Boeuf Floodway having then been in an operative condition, ready to function as designed by law, for several years (R. 157, 167, 170-171, 175-178, 246, 249, 258).

Thus since approximately 1932 respondent has actually lived in the bed of this artificial floodway, designed to carry 1,000,000 cubic second-feet of water when necessary (R. 145), nearly six times all the water that flows over Niagara Falls, and five times all the water that flows down the St. Lawrence River to the sea (R. 146), protected only by the fuse plug levee at the head of the Boeuf Floodway (R. 395). This enormous volume of water would flow over respondent's land from 20 to 25 feet deep (R. 160-161,

177, 397), with destructive velocity causing unpredictable disaster (R. 162, 169, 177). In another flood like that of 1927 the volume of water diverted down the Boeuf Floodway would be *more than double* that which heretofore at any time naturally flowed in this area (R. 165). Never before in history has respondent's land been subjected to inundation or overflow by floodwater artificially diverted from the main channel of the Mississippi River.

Now, as a matter of law: "to insure that excess water will leave the main River, a fuse plug section of the levee in the vicinity of Cypress Creek MUST be kept at its present strength and at its present grade, viz., 3 feet below the new levee grade. This *relatively weak section* will be long enough to discharge the greatest predicted possible excess water over and above the capacity of the leveed river below" (Doc. 90, Sec. 118, R. 124). "The levees generally will be (now HAVE BEEN) raised about 3 feet, so that the selected weaker, relief levees (the fuse plug levee), will be at about the elevation of the present levee top and *will surely serve their purpose*," (Doc. 90, Sec. 98, R. 123). "The United States MUST have control over the Cypress Creek (fuse plug) levee and *keep it substantially* at its present strength and present height" (Doc. 90, Sec. 120, R. 124). This fuse plug levee, which serves as an artificial escape-valve (Doc. 90, Sec. 97, R. 123), in comparison with the levees which have been constructed by the petitioner above and below, and on the opposite side of the river, is accurately and graphically illustrated by unquestioned exhibits at R. 393 and 395.

"*Fuse plug*" defined. "Floodways are not, in themselves, a method of complete flood control. They are normally constructed as an adjunct to a levee system. Flood-

*Scranton v. Wheeler*, 179 U. S. 141, 21 S. Ct. 48, 45 L. ed. 126.

*Gilman v. Philadelphia*, 3 Wall. 713, 18 L. ed. 96.

*Wisconsin v. Duluth*, 96 U. S. 379, 24 L. ed. 668.

*United States v. Chandler-Dunbar W. P. Co.*, 229 U. S. 53, 33 S. Ct. 667, 57 L. ed. 1063.

*Title 33 U. S. C. A.*, sec. 702c.

*Kohl v. United States*, 91 U. S. 367, 23 L. ed. 449.

*Hurley v. Kirkaid*, 285 U. S. 95, 52 S. Ct. 267, 76 L. ed. 637.

## POINT XI.

**The Law and Facts in the record which fix respondent's "Just Compensation."**

This Point covers Assignments of Error Nos. 105, 122, 123, 124, 125, 126, 127, 128, 129, 130, 133, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 157, 160, 166, and 167 (R. 104-108).

Cases and statutes referred to in the argument, in the order cited, are:

*Olson v. United States (Brewster v. United States)*, 292 U. S. 246, 54 S. Ct. 704, 78 L. ed. 1236 (affirming C. C. A. 8th, 67 Fed. (2d) 24, 106 A. L. R. 961).

*United States v. Chicago, Burlington & Quincy Railroad Company*, (C. C. A. 8th) 82 Fed. (2d) 131, 106 A. L. R. 942, certiorari denied 298 U. S. 689, 56 S. Ct 957, 80 L. ed. 1408; Annotation 106 A. L. R. 955.

*Flood Control Act of May 15, 1928.*

*Title 28 U. S. C. A.*, sec. 41 (20).

*Jacobs v. United States*, 290 U. S. 13, 54 S. Ct. 26, 78 L. ed. 142.

*United States v. Great Falls Manufacturing Company*, 112 U. S. 645, 5 S. Ct. 306, 28 L. ed. 846.

*Roberts v. Northern Pacific Railroad Company*, 158 U. S. 1, 15 S. Ct. 756, 39 L. ed. 873.

*Portsmouth Harbor Land & Hotel Company v. United States*, 260 U. S. 327, 43 S. Ct. 135, 67 L. ed. 287.

*Hurley v. Kincaid*, 285 U. S. 95, 52 S. Ct. 267, 76 L. ed. 637.

*Great Falls Mfg. Co. v. Garland, Atty. Genl.*, 124 U. S. 581, 8 S. Ct. 631, 31 L. ed. 527.

*United States v. Lynah*, 188 U. S. 445, 23 S. Ct. 349, 47 L. ed. 539.

20. *Corpus Juris*, p. 530, sec. 18.

*Orgel on Valuation under Eminent Domain*, p. 444, Note 50; p. 4, sec. 1.

*Constitution, Fifth Amendment.*

*Orgel on Valuation under Eminent Domain*, p. 18, p. 146, p. 822, p. 836.

*Constitution of the State of Arkansas of 1874*, Art. II, Sec. 22.

*Little Rock & Fort Smith Ry. Co. v. Greer*, 77 Ark. 387, 96 S. W. 129.

*Cribbs v. Benedict*, 64 Ark. 555, 44 S. W. 707.

*Brown v. Morison*, 5 Ark. 217.

*Roberts v. Williams*, 15 Ark. 43.

*Memphis etc. Ry. Co. v. Organ*, 67 Ark. 84, 55 S. W. 952.

*Cairo etc. Ry. Co. v. Turner*, 31 Ark. 494.

*Ex parte Martin*, 13 Ark. 198.

*Louisiana etc. Ry. Co. v. State*, 85 Ark. 12, 106 S. W. 960.

*State v. St. Louis, etc. Ry. Company*, 85 Ark. 422, 108 S. W. 508.

*United States v. New River Collieries Company*, 262 U. S. 341, 43 S. Ct. 565, 67 L. ed. 1014.

*Monongahela Navigation Company v. United States*, 148 U. S. 312, 13 S. Ct. 622, 37 L. ed. 463.

*Cooley's Constitutional Limitations*, (7th ed.) p. 818.

*Lewis on Eminent Domain*, (3d ed.) sec. 712, sec. 830.

*East Peoria Sanit. Dist. v. Toledo P. & W. Rd. Co.*, 353 Ill. 296, 187 N. E. 512, 89 A. L. R. 870.

*Annotation*, 89 A. L. R. 879-887.

*Jacksonville & S. R. Co. v. Kidder*, 21 Ill. 131.

*Spann v. City of Dallas*, 111 Tex. 350, '235 S. W. 513,  
19 A. L. R. 1387.

*Buchanan v. Warley*, 245 U. S. 60, 38 S. Ct. 16, 62 L.  
ed. 149.

*Eaton v. Boston C. & M. R. R. Co.*, 51 N. H. 504, 12 Am.  
Rep. 147.

*Transcontinental Oil Co. v. Emmerson*, 298 Ill. 394,  
131 N. E. 645, 16 A. L. R. 507.

*Shedd v. Patterson*, 312 Ill. 371, 144 N. E. 5.

*Tatum Bros., etc., Co. v. Watson*, 92 Fla. 278, 289, 109  
So. 623.

*C. B. & Q. R. Co. v. Public Utilities Com.*, 69 Col. 275,  
193 Pac. 726.

*In re: Crook*, 219 Fed. 979.

*Watson v. Wolf*, 162 Pa. 153, 29 Atl. 646.

*Grand Rapids Booming Co. v. Jarvis*, 30 Mich. 308.

*Holst v. Savannah Elec. Co.*, 131 Fed. 931.

*State v. Kreutzberg*, 114 Wis. 530, 90 N. W. 1098.

*Pennsylvania R. R. Co. v. Angel*, 41 N. J. E. 316, 7  
Atl. 432.

*Smith v. Campbell*, 10 N. C. 590.

*Cleveland, etc., R. R. v. Backus*, 154 U. S. 439.

*Branson v. Bush*, 251 U. S. 182.

*Block v. Hirsch*, 256 U. S. 135.

*Pennsylvania Company v. Mahon*, 260 U. S. 393, 414,  
43 S. Ct. 158, 67 L. ed. 322.

*Ann. Cas.* 1918A, 1201.

*Ambler Realty Co. v. Village of Euclid*, 207 Fed. 321.

*Omnia Commercial Co., Inc. v. United States*, 261 U.  
S. 502, 43 S. Ct. 437, 67 L. ed. 773.

*Monongahela Navigation Co. v. United States*, 148 U.  
S. 312, 13 S. Ct. 622, 37 L. ed. 463.

*United States v. Welch*, 217 U. S. 333, 30 S. Ct. 527,  
54 L. ed. 787, 28 L. R. A. (N. S.) 385, 19 Ann. Cas.  
680.

*Drainage Commissioners v. Knox*, 237 Ill. 148, 86 N.  
E. 636.

*Pumpelly v. Green Bay & Miss. River Canal Co.*, 13  
Wall. 166, 20 L. ed. 557.

*Lewis, Eminent Domain* (3d ed.), sec. 68.



*Sanguinetti v. United States*, 264 U. S. 146, 44 S. Ct. 264, 68 L. ed. 608.

*Horstmann Co. v. United States*, 257 U. S. 138, 42 S. Ct. 58, 66 L. ed. 171.

*Gibson v. United States*, 166 U. S. 269, 17 S. Ct. 578, 41 L. ed. 996.

*Great Falls Mfg. Co. v. Garland, Attorney General*, 124 U. S. 581, 8 S. Ct. 631, 31 L. ed. 527.

*Jacobs v. United States*, 45 Fed. (2d) 34, (C. C. A. 5th).

*Miss. & R. R. Boom Co. v. Patterson*, 98 U. S. 403, 25 L. ed. 206.

*United States v. Williams*, 188 U. S. 485, 23 S. Ct. 363, 47 L. ed. 554.

*Manigault v. Springs*, 199 U. S. 473, 26 S. Ct. 127, 50 L. ed. 274.

*United States v. Sewell*, 217 U. S. 601, 30 S. Ct. 691, 54 L. ed. 897.

*United States v. Grizzard*, 219 U. S. 180, 31 S. Ct. 162, 55 L. ed. 165.

*Curtin v. Benson*, 222 U. S. 78, 32 S. Ct. 31, 56 L. ed. 102.

*Philadelphia Co. v. Stimson*, 223 U. S. 605, 32 S. Ct. 340, 56 L. ed. 570.

*Richards v. Washington Terminal Co.*, 233 U. S. 546, 34 S. Ct. 654, 58 L. ed. 1088.

*United States v. North American Transp. & Trading Co.*, 253 U. S. 330, 40 S. Ct. 518, 64 L. ed. 935.

*Duckett & Co. v. United States*, 266 U. S. 149, 45 S. Ct. 38, 69 L. ed. 216.

*Campbell v. United States*, 266 U. S. 368, 45 S. Ct. 115, 69 L. ed. 328.

*Hersch v. United States*, 15 Ct. Cls. 385.

*Merriam v. United States*, 29 Ct. Cls. 250.

*Wayne County, Ky. v. United States*, 53 Ct. Cls. 417; aff'd., 252 U. S. 574, 40 S. Ct. 394, 64 L. ed. 723.

*Chappel v. United States*, 34 Fed. 673.

*In re: Delafield*, 109 Fed. 577.

*United States v. Chicago, B. & Q. R. Co.*, (C. C. A. 8th) 82 Fed. (2d) 131, 106 A. L. R. 942.

*United States v. Wabasha-Nelson Bridge Co.*, (C. C. A. 7th) 83 Fed. (2d) 852.

*Fruth v. Board of Affairs*, 75 W. Va. 456, 84 S. E. 105, L. R. A. 1915C 981.

*Bruch v. Carter*, 32 N. J. L. 554.

*Fitzhugh v. City of Jackson*, 132 Miss. 585, 97 So. 190, 33 A. L. R. 279.

*Lovett v. West Virginia Central Gas Co.*, 65 W. Va. 739, 65 S. E. 196, 24 L. R. A. (N. S.) 230.

*Traut v. White*, 46 N. J. E. 437, 19 Atl. 196.

*Myer v. Adam*, 71 N. Y. S. 707.

*Wateree Power Co. v. Rion*, (S. C.), 102 S. E. 331.

*Forster v. Scott*, 136 N. Y. 577, 32 N. E. 976, 18 L. R. A. 543.

*St. Louis v. Hill*, 116 Mo. 527, 22 S. W. 861, 21 L. R. A. 226.

*School Corporation v. Heiney*, 178 Ind. 1, 98 N. E. 628, 43 L. R. A. (N. S.) 1023.

*Glover v. Powell*, 10 N. J. E. 211.

*In re: Jacobs*, 98 N. Y. 98.

*Old Colony etc. R. Co. v. County*, 14 Gray 155.

*Thompson v. Androscoggin River Imp. Co.*, 54 N. H. 545.

*Stockdale v. Rio Grande W. R. Co.*, 28 Utah 201, 77 Pac. 849.

*People ex rel. M. W. Advertising Co. v. Murphy*, 113 N. Y. S. 855.

*Webster County v. Lutz*, 234 Ky. 618, 28 S. W. (2d) 966.

*Martin et al., ex parte*, 13 Ark. 198.

*Lewis, Eminent Domain*, (3d ed.) secs. 889, 71, 74, 75, 78, 85, 88, 112.

20 *Corpus Juris*, p. 684, sec. 147.

*Tempel v. United States*, 248 U. S. 121, 39 S. Ct. 56, 63 L. ed. 162.

*In re: Mayor*, 58 N. Y. S. 58.

*Louisville & N. R. Co. v. Lambert*, 33 Ky. L. R. 199, 110 S. W. 305.

*Ft. Wayne & S. W. T. Co. v. Fort Wayne & W. R. Co.*, 83 N. E. 665, 16 L. R. A. (N. S.) 537.

*Hampden, etc., Co. v. Springfield, etc., R. Co.*, 124 Mass. 118.

*In re: Department of Public Parks*, 6 N. Y. S. 750.

*People ex rel. Canavan v. Collis, Commissioner of Public Works*, 46 N. Y. S. 727.

*Chelton Trust Co. v. Blankenburg*, (Pa.) 88 Atl. 664.

*In re: Philadelphia Parkway*, (Pa.) 95 Atl. 429.

*Cooley's Const. Lim.*, (7th ed.), p. 818.

*McFadden v. Johnson*, 72 Pa. 336, 13 Am. Rep. 681.

*Wood on Railroads*, vol. 2, p. 994.

*Lexington & O. R. Co. v. Ormsby*, 7 Dana. 277.

*Harlow v. Marquette, H. & O. R. Co.*, 41 Mich. 366.

*Cairo & F. R. Co. v. Turner*, 31 Ark. 494, 25 Am. Rep. 554.

*Pettibone v. La Crosse & M. R. Co.*, 14 Wis. 443.

*Chicago & A. R. Co. v. Goodwin*, 111 Ill. 282, 53 Am. Rep. 622.

*Roberts v. N. P. R. R. Co.*, 158 U. S. 1, 15 S. Ct. 756, 39 L. ed. 873.

*Mullen Benevolent Corporation v. United States*, 290 U. S. 89, 54 S. Ct. 38, 78 L. ed. 192.

*Mullen Benevolent Corporation v. United States*, 63 Fed. (2d) 48.

*Title 33 U. S. C. A.*, secs. 702a-10.

*Arkansas Highway Commission v. Kincannon*, 193 Ark. 450, 100 S. W. (2d) 969.

*City of Big Rapids v. Big Rapids F. M. Co.*, (Mich.) 177 N. W. 284.

*People v. Murphy*, 113 N. Y. S. 855.

*Kansas City Ordinance*, (Mo.) 252 S. W. 404.

*Prairie Pipe Line Co. v. Shipp*, 305 Mo. 663, 267 S. W. 647.

20 *Corpus Juris*, pp. 666-668, sec. 138.

*Lewis, Eminent Domain*, p. 66.

*Christman v. United States*, (C. C. A.) 74 Fed. (2d) 112.

*Hill v. United States*, 149 U. S. 593, 13 S. Ct. 1011, 37 L. ed. 862.

*Hot Springs R. R. Co. v. Williamson*, 45 Ark. 429, affirmed, 136 U. S. 121, 10 S. Ct. 955, 34 L. ed. 355.

## POINT VI.

**The Boeuf Spillway has not been abandoned.**

This Point covers Assignments of Error Nos. 141, 155, 156, 157, 173, 177, 202, 222, and 223 (R. 106-111).

Cases and statutes referred to in the argument are:

*Flood Control Act* of June 15, 1936.

*Flood Control Act* of May 15, 1928.

*Olson v. United States*, 292 U. S. 246, 54 S. Ct. 704, 78 L. ed. 1236.

*Heard v. Farmers Bank of Hardy*, 174 Ark. 194, 295 S. W. 38.

## POINT VII.

**The testimony anent CUT-OFFS is irrelevant, incompetent and immaterial. This testimony does not touch the issue of liability.**

This Point covers Assignments of Error Nos. 89, 141, 155, 158, 159, 195, 224, 225, 226, and 227 (R. 104-112).

Cases and statutes referred to in the argument are:

*Flood Control Act* of May 15, 1928.

## POINT VIII.

**The testimony anent the economic Depression and Tax Burden is irrelevant, incompetent and immaterial. This testimony is remote from respondent's loss, and without evidential value under the particular facts of this case.**

This Point covers Assignments of Error Nos. 71, 72, 182 and 186 (R. 103-109).

Cases and statutes referred to in the argument are:

*Flood Control Act* of May 15, 1928.

## POINT IX.

The Findings of Fact, requested by respondent (R. 298-334), are justified, and supported in the record, by (1) official Public Documents, (2) Uncontradicted Testimony, and (3) proved indubitably.

This Point covers Assignments of Error Nos. 5 to 105, inclusive, (R. 99-104).

Cases and statutes referred to in the argument are:

*Title 33 U. S. C. A.*, secs. 641, 647, 648, 701, 702.

*Flood Control Act* of May 15, 1928.

*Flood Control Act* of June 15, 1936.

## POINT X.

This Point distinguishes decisions relied on by petitioner.

No particular Assignments of Error are involved.

Cases and statutes referred to in the argument, in the order cited, are:

*Cubbins v. Mississippi River Commission*, 241 U. S. 351, 36 S. Ct. 671, 60 L. ed. 1041.

*Jackson v. United States*, 230 U. S. 1, 33 S. Ct. 1011, 57 L. ed. 1363.

*Hughes v. United States*, 230 U. S. 24, 33 S. Ct. 1019, 57 L. ed. 1374.

*Sanguinetti v. United States*, 264 U. S. 146, 44 S. Ct. 264, 68 L. ed. 608.

*Horstmahn Co. v. United States*, 257 U. S. 138, 42 S. Ct. 58, 66 L. ed. 171.

*Bedford v. United States*, 192 U. S. 217, 24 S. Ct. 238, 48 L. ed. 414.

*Gibson v. United States*, 166 U. S. 269, 17 S. Ct. 578, 41 L. ed. 996.

*Flood Control Act* of May 15, 1928.

*Jacobs v. United States*, (5th Circuit) 45 Fed. (2d)



- Cleveland etc. R. Co. v. Hadley*, (Ind.), 101 N. E. 473,  
45 L. R. A. (N. S.) 796.
- Lewis on Eminent Domain*, (3d ed.) secs. 713, 818, 825,  
845, and 846.
- United States v. Creek Nation*, 295 U. S. 103, 55 S. Ct.  
681, 79 L. ed. 1331.
- Orgel on Valuation under Eminent Domain*, sec. 5.
- Seaboard Airline Ry. Co. v. United States*, 261 U. S.  
299, 43 S. Ct. 354, 67 L. ed. 664.
- Phelps v. United States*, 274 U. S. 341, 47 S. Ct. 611,  
71 L. ed. 1083.
- Brooks-Scanlon Corporation v. United States*, 265 U.  
S. 106, 44 S. Ct. 471, 68 L. ed. 934.
- United States v. Cress*, 243 U. S. 316, 37 S. Ct. 380, 61  
L. ed. 746.
- 10 *Ruling Case Law*, p. 129, sec. 112; p. 134, sec. 117.
- Emmons v. Utilities Power Company*, (N. H.) 141  
Atl. 65, 58 A. L. R. 788.
- Alabama Power Company v. Carden*, 189 Ala. 384, 66  
So. 596.
- Seattle Mattress & Upholstery Co. v. Seattle*, 134 Wash.  
476, 236 Pac. 84.
- Schuylkill Nav. Company v. Thoburn*, 7 Serg. & R.  
(Pa.) 411.
- 9 *Ruling Case Law*, pp. 735-736, secs. 2-3.
- Eaton v. Boston C. & M. Rd. Company*, 51 N. H. 504,  
12 Am. Rep. 147.
- Orgel on Valuation under Eminent Domain*, sec. 19,  
sec. 80, sec. 106.
- Little Rock Junction Ry. v. Woodruff*, 49 Ark. 381,  
5 S. W. 792.
- Orgel on Valuation under Eminent Domain*, secs. 236,  
14, 20, 23 and 25.
- United States v. Inlets*, 26 Fed. Cas. 490, aff'd in *Kohl*  
*v. United States*, 91 U. S. 367, 23 L. ed. 449.
- National City Bank v. United States*, 275 Fed. 855,  
aff'd 281 Fed. 754.
- C. G. Blake Company v. United States*, 275 Fed. 861,  
aff'd 279 Fed. 71.

- Tilden v. United States*, (D. C. La., 1934) 10 F. Supp. 377.
- United States v. Chandler-Dunbar Co.*, 229 U. S. 53, 33 S. Ct. 667, 57 L. ed. 1063.
- Boston Chamber of Commerce v. Boston*, 217 U. S. 189, 30 S. Ct. 459, 54 L. ed. 725.
- 1 Nichols, *Eminent Domain*, 663, 671.
- 2 Lewis, *Eminent Domain*, sec. 706, sec. 707.
- Omnia Commercial Company v. United States*, 261 U. S. 502, 43 S. Ct. 437, 67 L. ed. 773.
- Matter of City of New York (Inwood Hill Park)*, 230 App. Div. 41, 243 N. Y. S. 63.
- Clark's Ferry Bridge Co. v. Public Service Commission*, 291 U. S. 227, 54 S. Ct. 427, 78 L. ed. 767.
- New York v. Sage*, 239 U. S. 57, 36 S. Ct. 25, 60 L. ed. 143.
- Mississippi & R. R. Boom Co. v. Patterson*, 98 U. S. 403, 25 L. ed. 206.
- Wetmore v. Rymer*, 169 U. S. 115, 18 S. Ct. 293, 42 L. ed. 682.
- Conneas v. Commonwealth*, 184 Mass. 541, 69 N. E. 34.
- Southern Ry. Co. v. Memphis*, (Tenn.) 148 S. W. 662, 41 L. R. A. (N. S.) 828.
- Muscoda Bridge Co. v. Grant County*, 200 Wis. 185, 227 N. W. 863.
- Raleigh v. Mecklinburg Mfg. Co.*, (N. C.) 85 S. E. 300, L. R. A. 1916A, 1090.
- Central Georgia Power Co. v. Mays*, 137 Ga. 120, 72 S. E. 900.
- In re: New York etc. Co. v. Blacker*, 178 Mass. 386, 59 N. E. 1020.
- McCandless v. United States*, 298 U. S. 342, 56 S. Ct. 764, 80 L. ed. 1205.
- Idaho & W. R. Co. v. Columbia Conference*, 20 Idaho 568, 119 Pac. 60, 38 L. R. A. (N. S.) 497.
- Act of June 30, 1906*, 34 Stat. 764, Title 31 U. S. C. A., Sec. 627.
- Revised Statutes*, sec. 3733, Title 41 U. S. C. A., sec. 12.

*Jackson v. United States*, 230 U. S. 1, 33 S. Ct. 1011, 57 L. ed. 1363.

*Heath v. Wallace*, 138 U. S. 573, 11 S. Ct. 380, 34 L. ed. 1063.

*Jones v. United States*, 137 U. S. 202, 11 S. Ct. 80, 34 L. ed. 691.

*Hoyt v. Russell*, 117 U. S. 401, 6 S. Ct. 881, 29 L. ed. 914.

*Schollenberger v. Pennsylvania*, 171 U. S. 1, 18 S. Ct. 757, 43 L. ed. 49.

*Nicol v. Ames*, 173 U. S. 509, 19 S. Ct. 522, 43 L. ed. 786.

10 *Ruling Case Law*, p. 1100, sec. 303; and page 861, sec. 3.

*Muller v. Oregon*, 208 U. S. 412, 28 S. Ct. 324, 52 L. ed. 551.

*Daniels v. Tearney*, 102 U. S. 415, 26 L. ed. 187.

*Brown v. Piper*, 91 U. S. 37, 23 L. ed. 200.

*Sparrow v. Strong*, 3 Wall. 98, 18 L. ed. 49.

*Re: Boyer, ex parte*, 109 U. S. 629, 3 S. Ct. 434, 27 L. ed. 1056.

*Heard v. Farmers' Bank*, 174 Ark. 194, 295 S. W. 38.

1 *Jones Commentaries on Evidence* (2d ed.), secs. 440-444, 447-449.

*Cubbins v. Mississippi River Commission*, 241 U. S. 351, 36 S. Ct. 671, 60 L. ed. 1041.

*Erie Railroad Co. v. Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. ed. 1188, at p. 1194, notes 20 and 21.

*United States v. Bekins*, 304 U. S. 27, 58 S. Ct. 811, 82 L. ed. 1137, at pp. 1142, 1143, notes 1, 2 and 3.

*United States v. Klamath and Moadoc Tribes*, 304 U. S. 119, 58 S. Ct. 799, 82 L. ed. 1219, at p. 1224, note 14.

*National Labor Relations Board v. Jones & Laughlin Steel Corporation*, 301 U. S. 1, 57 S. Ct. 615, 108 A. L. R. 1352, 81 L. ed. 893.

Title 28 U. S. C. A., sec. 41 (20).

*Judicial Code*, sec. 164.

36 *Stat.* 1140.

## POINT II.

The Jadwin Plan, enacted into law by the Flood Control Act of May 15, 1928, is one, single, comprehensive project, of which the Boeuf Floodway is an essential and vital feature. When work began on any part of this entire project it affected property in the Boeuf Floodway.

This Point covers Assignments of Error Nos. 40, 169, 172, 174, 201, and 203 (R. 101-110).

Cases and statutes referred to in the argument are:

*Flood Control Act* of May 15, 1928.

*Hurley v. Kincaid*, 285 U. S. 95, 52 S. Ct. 267, 76 L. ed. 637.

*United States v. Hess*, 70 Fed. (2d) 142, 71 Fed. (2d) 78.

## POINT III.

The Boeuf Spillway is in operative condition, certain to function as designed. The proposed guide levees, which have not been built, are unnecessary and immaterial to respondent's cause of action.

This Point covers Assignments of Error Nos. 26, 27, 28, 29, 30, 31, 32, 33, 36, 43, 48, 52, 233, 234, 235, 236, 237, and 238 (R. 100-113).

Cases and statutes referred to in the argument are:

*Flood Control Act* of May 15, 1928.

## POINT IV.

The Boeuf Floodway is an artificial diversion for which the United States is solely responsible. Absolute Federal control over the fuse plug levee authorized by the Flood Control Act of May 15, 1928, creates the Boeuf Floodway.

This Point covers Assignments of Error Nos. 34, 35, 37, 38, 41, 42, 43, 67, 161, 231, and 232 (R. 101-112).

Cases and statutes referred to in the argument are:

*Flood Control Act* of May 15, 1928.

*Hurley v. Kincaid*, 285 U. S. 95, 52 S. Ct. 267, 76 L. ed. 637.

*Cubbins v. Mississippi River Commission*, 241 U. S. 351, 36 S. Ct. 671, 60 L. ed. 1041.

*Jackson v. United States*, 230 U. S. 1, 33 S. Ct. 1011, 57 L. ed. 1363.

*Hughes v. United States*, 230 U. S. 24, 33 S. Ct. 1019, 57 L. ed. 1374.

*Title 33 U. S. C. A.*, sec. 702i, sec. 408, sec. 701, sec. 702, sec. 411.

30 *Stat.* 1152.

39 *Stat.* 950.

42 *Stat.* 1505.

*Houck v. United States*, 201 Fed. 862, 120 C. C. A. 200.

*Cape Girardeau & T. B. T. R. Co. v. Jordan*, 201 Fed. 868, 120 C. C. A. 206.

*Scranton v. Wheeler*, 179 U. S. 141, 21 S. Ct. 48, 45 L. ed. 126.

*United States v. Chandler-Dunbar W. P. Co.*, 229 U. S. 53, 33 S. Ct. 667, 57 L. ed. 1063.

*Gilman v. Philadelphia*, 3 Wall. 713, 18 L. ed. 96.

*Wisconsin v. Duluth*, 96 U. S. 379, 24 L. ed. 668.

*River and Harbor Act* of March 3, 1899, secs. 13, 14, 16 and 17.

## POINT V.

The established physical facts prove a "TAKING" of respondent's private "property" for public use. Actual physical invasion of her land is irrelevant. No consequential damages are involved.

This Point covers Assignments of Error Nos. 1, 2, 3, 4, 21, 22, 23, 24, 25, 44, 46, 70, 71, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 132, 134, 135, 136, 137, 138, 188, 192, 193, 194, 199, 208, 209, 229, 230, and 239 (R. 99-113).



Cases and statutes referred to in the argument, in the order cited, are:

Constitution, *Fifth Amendment*.

*Flood Control Act* of May 15, 1928.

*Flood Control Act* of June 15, 1936.

*United States v. Hess*, (C. C. A. 8th) 70 Fed. (2d) 142.

*United States v. Hess*, (C. C. A. 8th) 71 Fed. (2d) 78.

*United States v. Yazoo & M. V. Ry. Co.*, 4 Fed. Supp. 366.

*United States v. Great Falls Mfg. Co.*, 112 U. S. 645, 55 S. Ct. 306, 28 L. ed. 846.

*Cubbins v. Mississippi River Commission*, 241 U. S. 351, 36 S. Ct. 671, 60 L. ed. 1041.

*Jackson v. United States*, 230 U. S. 1, 33 S. Ct. 1011, 57 L. ed. 1363.

*Hughes v. United States*, 230 U. S. 24, 33 S. Ct. 1019, 57 L. ed. 1374.

*Bedford v. United States*, 192 U. S. 217, 48 L. ed. 414.

*Kincaid v. United States*, 35 Fed. (2d) 235, 37 Fed. (2d) 602, and 49 Fed. (2d) 768.

*Hurley v. Kincaid*, 285 U. S. 95, 52 S. Ct. 267, 76 L. ed. 637.

*Title 28 U. S. C. A.*, sec. 71.

*United States v. Lynah*, 188 U. S. 445, 23 S. Ct. 349, 47 L. ed. 539.

*United States v. Cress*, 243 U. S. 316, 37 S. Ct. 380, 61 L. ed. 746.

*Peabody v. United States*, 231 U. S. 530, 34 S. Ct. 159, 58 L. ed. 351.

*Portsmouth Harbor Land & Hotel Co. v. United States*, 250 U. S. 1, 39 S. Ct. 399, 63 L. ed. 809; 260 U. S. 327, 43 S. Ct. 135, 67 L. ed. 287.

*Jacobs v. United States*, 290 U. S. 13, 54 S. Ct. 26, 78 L. ed. 142, 96 A. L. R. 1.

50 *Corpus Juris*, p. 729, sec. 2.

22 *Ruling Case Law*, pp. 37-39, secs. 2 and 3.

50 *Corpus Juris*, p. 745, sec. 17.

Lewis, *Eminent Domain* (3d ed.), secs. 63, 64, and 65, pp. 51-58.

alluvial valley and for its improvement from the Head of Passes to Cape Girardeau, Missouri, in accordance with *the engineering plan* set forth and recommended, \* \* \* in House Document numbered 90" (Sec. 1, R. 118). It consistently refers to "*the project*," "*this project*" (Secs. 1, 4 and 5), "*the adopted project*," "*the project herein adopted*," "*such project*," "*that part of the project on the east side of the river*" (Sec. 1), "*any item of the project*" (Sec. 3), "*the flood-control plan herein adopted*" (Sec. 4), "*the project herein authorized*" (Sec. 8).

Document 90 submits "*the following project for the flood control of the Mississippi River in its alluvial valley*" (Sec. 1); and consistently describes the entire project in the singular. "*The plan is a comprehensive one*" (Sec. 2, R. 119), which is repeatedly referred to as "*it*" (Sec. 2). Note: "*the recommended plan*" (Sec. 3, R. 119; Sec. 139, R. 125); "*the plan*" (Sec. 129, R. 125; Sec. 8, R. 120); "*the plan recommended*" (Sec. 23, R. 120); "*the project*" (Sec. 138, R. 125; Sec. 29, R. 120); "*the comprehensive plan*" (Sec. 38, R. 121); "*the plan is \* \* \* comprehensive, and provides for the disposal of all water predicted as possible*" (Sec. 99, R. 123); "*the comprehensive project recommended*" (Sec. 129, R. 125); "*the warning cannot be too strongly emphasized that unless the flood-discharge capacity provided in the plan herein recommended is preserved, a future great flood will result in a disaster*" (Sec. 140, R. 125); "*a comprehensive project \* \* \* as set forth in this document*" (Sec. 147, R. 126).

"*This project is fixed and not subject to review or change by this administration*" (Attorney General Mitchell, July 19, 1929, R. 129).

Of this "*one, unified, comprehensive project* for the flood control of the alluvial valley of the Mississippi River" (Mathes, R. 244), the middle section is the most critical part of the entire project (Doc. 1, p. 21, Sec. 17, R. 144). In this crucial middle section "the fuse plug relief levee at existing levee heights provides the best solution of the spillway problem. \* \* \* *the adopted project provides a sound engineering plan*" (Doc. 28, R. 127).

The Act (Jadwin Plan) involves the use of four floodways, each essential to the plan as a whole, each included as a part of the one, comprehensive plan (Doc. 90, Sec. 2), viz: (1) the relatively small by-pass or floodway from Birds Point to New Madrid for the protection of Cairo, Illinois, (2) the relatively small but important diversion at Bonnet Carre for the protection of New Orleans, (3) the Atchafalaya relief floodways for the lower Mississippi in southern Louisiana, and (4) the Boeuf Floodway for the relief of the critical middle section just below the mouth of the Arkansas River, for the protection of the balance of the alluvial valley (Doc. 90; sec. 121, R. 124).

These floodways are the distinctive *essential features* of the Jadwin Plan, and are so treated *together* throughout House Document 90. There is no justifiable distinction between either of the floodways so far as Government liability for their creation is concerned. Without these floodways there would be no Jadwin Plan. The Flood Control Act of May 15, 1928, is founded on these floodways. "The recommended plan fundamentally differs from the present project (prior to May 15, 1928) in that it *limits* the amount of flood water carried in the main river to its safe capacity and *sends* the surplus water through lateral *floodways*. Its *essential features* and their

clusive weight and decisive character. The District Court erred in refusing to adopt respondent's requested Conclusion of Law No. 26 (R. 339), and erred in acting upon petitioner's requested Conclusion of Law No. 24 (R. 375).

The Court is justified in accepting and acting upon reports of Congressional Committees, and explanations given on the floor of the Senate and House by those in charge of an Act of Congress, the legislative history of the Bill, and the testimony of official heads of Department given in Hearings before Congressional Committees on the Bill.

Every excerpt from each public document which respondent offered in evidence is not only competent as evidence but is from an official document of which this Court will take judicial notice. See:

*United States v. Pfitsch*, 256 U. S. 547, 41 S. Ct. 569, 65 L. ed. 1084, at p. 1086.

*Jennison v. Kirk*, 98 U. S. 453, 25 L. ed. 240, at pp. 242, 243.

*Church of the Holy Trinity v. United States*, 143 U. S. 457, 12 S. Ct. 511, 36 L. ed. 226, 229, 230.

*Edwards v. Darby*, 12 Wheat. 206, 6 L. ed. 603, at pp. 604-605.

*Boston Sand & Gravel Company v. United States*, 278 U. S. 41, 49 S. Ct. 52, 73 L. ed. 170, 177.

*Duplex Printing Press Company v. Deering*, 254 U. S. 443, 475, 41 S. Ct. 172, 65 L. ed. 349, at p. 360.

*United States v. Butler, etc., Hoosac Mills Corporation*, 297 U. S. 1, 56 S. Ct. 312, 80 L. ed. 477, at p. 497, and footnote p. 491.

*Wright v. Mountain Trust Bank*, 300 U. S. 440, 57 S. Ct. 556, 81 L. ed. 736, pp. 741, 742, 744, 745, footnotes 4, 8 and 9.

"Official letters of public officers have always been received as legal testimony."

*Savage v. United States*, 1 Court of Claims 170.

*Title 28 U. S. C. A.*, Sec. 272, p. 108, Footnote 5.

*Arizona v. California*, 283 U. S. 423, 51 S. Ct. 522, 75

L. ed. 1154, at p. 1165, footnotes.

*Thornton v. United States*, 271 U. S. 414, 46 S. Ct. 585,

70 L. ed. 1013, 1017.

23 *Corpus Juris*, Sec. 1901, p. 102, and numerous cases in footnotes.

*Tempel v. United States*, 248 U. S. 121, 39 S. Ct. 56,

63 L. ed. 162, footnotes pp. 163, 164.

“The court will take judicial notice of matters of general notoriety that may be gathered from the public documents of the government.”

*The Apollon*, 9 Wheat. 362, 6 L. ed. 111, at p. 114.

*Jackson v. United States*, 230 U. S. 1, 33 S. Ct. 1011,

57 L. ed. 1363, at p. 1372, 1373.

*Heath v. Wallace*, 138 U. S. 573, 11 S. Ct. 380, 34 L.

ed. 1063, at p. 1068.

*Jones v. United States*, 137 U. S. 202, 11 S. Ct. 80, 34

L. ed. 691, at p. 697.

*Hoyt v. Russell*, 117 U. S. 401, 6 S. Ct. 881, 29 L. ed.

914.

*Schollenberger v. Pennsylvania*, 171 U. S. 1, 18 S. Ct.

757, 43 L. ed. 49, 52.

*Nicol v. Ames*, 173 U. S. 509, 19 S. Ct. 522, 43 L. ed.

786, 792.

10 *Ruling Case Law*, p. 1100, sec. 303; and p. 861,

sec. 3.

“The court may not shut its eyes to any facts of common knowledge.”

*Muller v. Oregon*, 208 U. S. 412, 28 S. Ct. 324, 52 L.

ed. 551, 555-556.

*Daniels v. Tearney*, 102 U. S. 415, 26 L. ed. 187, at p.

188.

*Brown v. Piper*, 91 U. S. 37, 23 L. ed. 200, 201, 202.

*Sparrow v. Strong*, 3 Wall. 98, 18 L. ed. 49, 50.

*Re: Boyer, ex parte*, 109 U. S. 629, 3 S. Ct. 434, 27 L.

ed. 1056, at p. 1057.

*Heard v. Farmers' Bank*, 174 Ark. 194, at p. 206, 295

S. W. 38.



1 Jones *Commentaries on Evidence*, (2nd Ed.) Secs. 440-444, 447, 449.

"The court will take judicial notice of the dangerous floods to which the Mississippi River is occasionally subject."

*Cubbins v. Mississippi River Commission*, 241 U. S. 351, 36 S. Ct. 671, 60 L. ed. 1041.

This Court is more and more frequently basing its decisions on information found in public hearings before the appropriate congressional committees, and citing these authoritative hearings in its opinions. See *Erie Railroad Co. v. Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. ed. 1188, at p. 1194, notes 20 and 21; *United States v. Bekins*, 304 U. S. 27, 58 S. Ct. 811, 82 L. ed. 1137, at pp. 1142; 1143, notes 1, 2, and 3; *United States v. Klamath and Moadac Tribes*, 304 U. S. 119, 58 S. Ct. 799, 82 L. ed. 1219, at p. 1224, note 14.

In announcing its decision in *National Labor Relations Board v. Jones & Laughlin Steel Corporation*, 301 U. S. 1, 57 S. Ct. 615, 108 A. L. R. 1352, 81 L. ed. 893, at p. 914, the Court said: "We are asked to shut our eyes to the plainest facts of our national life and to deal with the question . . . in an intellectual vacuum." This the Court declined to do.

"Judge Cooley once said that 'Courts would justly be the subject of ridicule if they should deliberately shut their eyes to the sources of information which the rest of the world relies upon'."

*Heard v. Farmers' Bank of Hardy*, 174 Ark. 194, at p. 206, 295 S. W. 38.

In the exercise of jurisdiction in this case under the Tucker Act (Title 28, U. S. C. A., p. 35, Sec. 41 (20)) the

court sits as a Court of Claims. Hence there is no jury. In the exercise of this jurisdiction:

"The said court shall have power to call upon any of the departments for *any information or papers* it may deem necessary, and shall have the use of *all recorded and printed reports made by the committees of each House of Congress*, when deemed necessary in the prosecution of its business." *Judicial Code*, Sec. 164; 36 Stat. 1140; *Title 28 U. S. C. A.*, Sec. 272, p. 107.

*Collier v. United States*, 173 U. S. 79, 19 S. Ct. 330, 43 L. ed. 621, at pp. 622-623.

Unquestionably the Circuit Court of Appeals must be sustained on this Point.

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## POINT II.

**ONLY ONE Flood Control PROJECT** was adopted by the Flood Control Act of May 15, 1928, of which the Boeuf Floodway is a vital and essential feature.

The District Court erred in treating the Boeuf Floodway as "a separate and independent project," "separate and apart as a distinct entity"; and in holding that work done "upon the adopted project at other places other than the western section of the middle division cannot be construed as the commencement of work upon said western section of the said middle division, to-wit: the Boeuf Floodway." The District Court erred in adopting petitioner's requested Findings of Fact Nos. 4 (R. 352) and 25 (R. 358), and in declaring petitioner's requested Conclusions of Law Nos. 10 (R. 371) and 12 (R. 371-372).

No one thoroughly familiar with the legislative history involved, and keenly alive to the specific language of the Act and House Document numbered 90 which describes "the engineering plan" adopted and authorized to be prosecuted, can fall into such fundamental error.

When the Supreme Court in *Hurley v. Kincaid*, 285 U. S. 95, 52 S. Ct. 267, 76 L. ed. 637, declared that "a taking" was complete, giving rise to a cause of action, "as soon as work on THE PROJECT is begun," or "as soon as the Government begins to carry out THE PROJECT AUTHORIZED," the Court referred to work on any part of the Jadwin Plan which, *as a whole*, is designed to gather all the flood waters of the Mississippi River Basin (R. 391) lying above the junction of the Ohio and Mississippi Rivers, and carry these floods within the levees of the main stem of the Mississippi River to the extent of levee capacity.

but then to deliberately and artificially spill out of the main channel of the river, by selected diversions, all flood waters in excess of the safe carrying capacity of the levees below. By this Jadwin Plan, the present law, all of the enormous surface water of the Mississippi River Basin above the mouth of the Arkansas River, extending from Canada on the north, the Rocky Mountains on the west, and the Appalachian Mountains on the east, well-nigh inconceivable in its volume, is gathered by the levee system into a narrow funnel and hurled against a weak, fuse plug relief levee designed as an escape valve, immediately behind which lies respondent's property. See map of the plan attached to Doc. 90, 70th Congress, 1st Session, and R. 395.

The national aspect and unity of this single project is strikingly visualized at R. 391 (the sketch of the entire Mississippi River drainage basin); was explicitly recognized throughout all of the congressional debates on the Bill; and is manifested by the express language describing both the purpose and result of the adopted project. See Doc. 90, Sec. 23 (R. 120), and Doc. 90, Secs. 39-53 (R. 121).

Nowhere in either the Act, or in House Document No. 90, is a plural adjective ever used in referring to the adopted project, or suggesting the adoption of a combination of several independent projects. Every reference is to *one*, single, definite, comprehensive engineering plan intended to include the entire alluvial valley of the Mississippi River from its delta or mouth at the Head of Passes to the northern termination of the alluvial valley at Cape Girardeau, Missouri. Every descriptive adjective applied to this *one*, whole, entire plan is always *singular* and definite.

The Act adopts and authorizes the execution of *the* project for the flood control of the Mississippi River in its

Request No. 6 (R. 300) is proved by Doc. 90, Sec. 96, R. 122-123.

Request No. 7 (R. 300) is proved by Doc. 1, Sec. 17, R. 144.

Request No. 8 (R. 300) is proved by Doc. 90, Sec. 16, R. 120.

Request No. 9 (R. 301) is proved by Doc. 1, Sec. 7, R. 143-144.

Request No. 10 (R. 302) is proved by Doc. 90, Sec. 117, R. 123.

Request No. 11 (R. 302) is proved by Doc. 90, Sec. 118, R. 124.

Request No. 12 (R. 303) is proved by Doc. 90, Sec. 119, R. 124.

Request No. 13 (R. 303) is proved by Doc. 90, Sec. 120, R. 124.

Request No. 14 (R. 303) is proved by Doc. 90, Sec. 121, R. 124.

Request No. 15 (R. 303) is proved by Doc. 90, Sec. 134, p. 31.

Request No. 16 (R. 303) is proved by Doc. 90, Sec. 149, R. 126.

Request No. 17 (R. 304) is proved by Doc. No. 28, R. 127.

Request No. 18 (R. 304) is proved by Doc. No. 2, R. 127-128.

Request No. 19 (R. 304) is proved by Doc. No. 2, p. 12, R. 128.

Request No. 20 (R. 305) is proved by Doc. No. 2, pp. 13-16, R. 127-129.

Request No. 21 (R. 305) is proved by official, judicial records, R. 129-130.



Request No. 24 (R. 306) is proved by Doc. 90, Sec. 118, R. 124; and Doc. 798, pp. 26, 47, 54, R. 138-139.

Request No. 26 (R. 306) is proved by Doc. 798, p. 26, Sec. 17 and p. 29, Sec. 22 (f), R. 138. See also Wonson, R. 169, undisputed.

Request No. 27 (R. 306) is proved by Doc. 798, p. 44, Sec. 8, R. 139.

Request No. 28 (R. 306) is proved by official Hearings January 27, 1936, p. 43, R. 146; and R. 250.

Request No. 29 (R. 307) is proved by official Hearings February 27, 1934, pp. 24-25, R. 140-141.

Request No. 31 (Tr. 307) is proved by Title 33 U. S. C. A., Secs. 641, 647, 648, 701, 702, R. 132-134.

Request No. 43 (R. 311) is proved by Congressional Committee Reports and congressional debates.

Request No. 78 (R. 326) is proved by Doc. 90, Secs. 69-71, R. 248.

Request No. 92 (R. 331) is proved by Doc. 90, Secs. 8, 23, and 121, R. 120 and R. 124.

The public documents referred to were authenticated by stipulation of counsel (R. 298), and there is no question of their genuineness.

The District Court admitted these documents in evidence when offered (R. 118 and 126-127); but at the conclusion of respondent's testimony sustained petitioner's motion to strike the documents from the record as evidence (R. 287). Hence the competency of this evidence is vitally important.

Recent decisions not only dispel all possible doubt as to the competency of this evidence, but emphasize its con-

*Old Colony R. Co. v. Miller*, 125 Mass.<sup>n</sup> 1, 28 Am. Rep. 194.

*In re: Board of Water Supply*, 109 N. Y. State 1036.  
20 *Corpus Juris*, p. 997, sec. 394, p. 763, sec. 225.

*Lockhart Power Co. v. Askew*, 110 S. C. 449, 96 S. E. 685.

*Missouri R. & L. Co. v. Creed*, (Mo.) 32 S. W. (2d) 783 from 30 S. W. (2d) 605.

*Doty v. Johnson*, 84 Vt. 15, 77 Atl. 866.

*Hetzel v. Baltimore, etc., R. Company*, 169 U. S. 26, 18 S. Ct. 255, 42 L. ed. 648.

*Mullen Benevolent Corp. v. United States*, 63 Fed. (2d) 48.

*Controlling Human Behavior* by Daniel Starch, Hazel M. Stanton and Wilhelmine Koerth.

*Kansas City Southern Ry. Co. v. Boles*, 88 Ark. 533, 115 S. W. 375.

*Little Rock & Fort Smith Ry. v. McGehee*, 41 Ark. 207.

*Indiana, etc., Co. v. Pennsylvania R. Co.*, 229 Pa. 484, 78 Atl. 1039.

*Snyder v. The Western Union Rd. Co.*, 25 Wis. 60.

*Voigt v. Milwaukee*, 158 Wis. 666, 149 N. W. 392.

*Brainerd v. State*, 131 N. Y. S. 221.

*Fitzhugh v. Chesapeake, etc., R. Co.*, (Va.) 59 S. E. 415, 17 L. R. A. (N. S.) 124.

*St. Louis, etc., R. Co. v. Mendoza*, 193 Mo. 518, 91 S. W. 65.

*Evans v. Iowa Southern Utilities Co.*, (Ia.), 218 N. W. 66.

*Louisville & N. R. Company v. Lambert*, 33 Ky. L. R. 199, 110 S. W. 305.

*Stertz v. Stewart*, 74 Wis. 160, 42 N. W. 214.

*Montana Ry. Company v. Warren*, 137 U. S. 348, 11 S. Ct. 96, 34 L. ed. 681.

*Lewis, Eminent Domain*, sec. 655.

4 *Wigmore, Evidence*, sec. 1942.

*Lawson, Expert and Opinion Evidence*, 491.

*Orgel, Valuation under Eminent Domain*, sec. 130, sec. 132, sec. 133.

*Chicago etc. R. Rd. Co. v. Heidenreich*, 254 Ill. 231,  
98 N. E. 567, Ann. Cas. 1913C, 266,  
*Orgel, Valuation under Eminent Domain*, secs. 137, 146,  
153.  
*Springfield & Memphis Ry. v. Rhea*, 44 Ark. 258.  
*St. Louis etc. Ry. Co. v. Magness*, 93 Ark. 46, 123 S. W.  
786.

## POINT XII.

Respondent Mrs. Julia Caroline Sponenbarger is the sole proper party plaintiff. Other parties plaintiff were improperly made parties by the Court.

This Point covers Assignments of Error Nos. 162, 163, 164, 165, 215, 216, 217, 218, 219, and 220 (R. 107-111).

Cases and statutes referred to in the argument are:

Constitution, *Fifth Amendment*.

*Boston Chamber of Commerce v. City of Boston*, 217  
U. S. 189, 30 S. Ct. 459, 54 L. ed. 725.

20 *Corpus Juris*, 1187, and 653, and 1178, and 1185,  
and 847, 1188.

47 *Corpus Juris*, 56.

*Chicago B. & Q. Ry. Co. v. Willard*, 220 U. S. 413, 31  
S. Ct. 460, 55 L. ed. 521.

*A. W. Duckett & Company v. United States*, 266 U. S.  
149, 45 S. Ct. 38, 69 L. ed. 216.

*United States v. Welch*, 217 U. S. 333, 30 S. Ct. 527, 54  
L. ed. 787.

*Wayne County, Ky. v. United States*, 43 Court of  
Claims 417, aff'd., 252 U. S. 574, 40 S. Ct. 394,  
64 L. ed. 723.

*Clark v. United States*, 67 Ct. Cls. 337.

*Chiesa & Co. v. City of Des Moines*, 158 Iowa 343, 198  
N. W. 922.

*McGowan v. Milford*, 104 Conn. 452, 133 Atl. 570.

*Watuppa Reservoir Co. v. Fall River*, 134 Mass. 267.

*Storms v. Manhattan Ry. Company*, 79 N. Y. S. 60.

*Hill v. Glendon etc. Mining Company*, 113 N. C. 259,  
18 S. E. 171.

*Reading R. Company v. Boyer*, 13 Pa. St. 496.

*Colcough v. Nashville etc. R. Company*, 2 Head (Tenn.)  
171.

*Grand Rapids Booming Co. v. Jarvis*, 30 Mich. 308.

*Parks v. City of Boston*, 15 Pick. 198.

*Jordan v. City of Benwood*, 42 W. Va. 312, 26 S. E.  
266.

*Cayce Land Co. v. Southern Ry. Company*, 111 S. C.  
115, 96 S. E. 725.

*Ranforth v. City of New York*, 183 N. Y. S. 629, aff'd,  
183 N. Y. S. 956.

*Turner v. R. R. Company*, 130 Mo. App. 535, 109 S. W.  
101.

*Peabody v. United States*, 231 U. S. 530, 34 S. Ct. 159,  
58 L. ed. 351.

*Whitecotton v. St. Louis etc. R. Co.*, 104 Mo. A. 65,  
78 S. W. 318.

*Mayor, etc., of Baltimore v. Latrobe*, 101 Md. 621, 61  
Atl. 203, 4 Ann. Cas. 1005.

*United States v. Welch*, 217 U. S. 333, 30 S. Ct. 527, 54  
L. ed. 787, 28 L. R. A. (N. S.) 385, 19 Ann. Cas.  
680.

*Orgel, Valuation under Eminent Domain*, p. 374, pp.  
382, 383 and 392.

*Kindred v. Union Pacific Rd. Company*, 225 U. S. 582,  
32 S. Ct. 780, 56 L. ed. 1216.

*Roberts v. Northern Pacific Rd. Company*, 158 U. S.  
1, 15 S. Ct. 756, 39 L. ed. 873.

2 Lewis, *Eminent Domain* (3d ed.), p. 936, sec. 517; and  
cases therein cited; and p. 937, sec. 517.

*Louisville & N. R. Company v. Lambert*, 33 Ky. L. R.  
199, 110 S. W. 305.

*Federal Trust Company v. East Hartford Fire Dist.*  
283 Fed. 95.

*Knoll v. New York, etc. R. Company*, 121 Pa. 467, 15  
Atl. 571, 1 L. R. A. 366.

**ARGUMENT.****POINT I.****DOCUMENTARY EVIDENCE, Competency and Weight.**

The District Court erred in refusing to receive official, public documents as evidence conclusively establishing respondent's cause of action.

The best, and in fact conclusive, evidence of the taking of respondent's property as alleged in her Complaint (R. 4-16) is found in the official documentary evidence filed in proof (R. 118-156).

Actually each of respondent's requested Findings of Fact essential to the establishment of her cause of action, and determinative of petitioner's liability here, is irrefutably verified and settled by an official public document. These official documents were each intended for the information of Congress, and were published only after exhaustive research and careful deliberation. The Congress has relied upon these official public documents, and has based the national policy thereon.

Specifically, the absolute proof of each of respondent's requests for Findings of Fact, rejected by the district court, is found in the record as follows:

Request No. 3 (R. 299) is proved by the *Act*. (R. 118).

Request No. 4 (R. 299) is proved by judicial knowledge of national flood control legislation and the congressional debates and committee reports. See Neptune, R. 157.

Request No. 5 (R. 300) is proved by Doc. 90, Sec. 3, R. 119.



in Boeuf Floodway called for in the flood control plan of May 15, 1928, have not been constructed. They are *in no way essential to the functioning of the plan* so as to protect all of the alluvial valley of the Mississippi River except that portion actually in the floodway, as designed. *The fuse plug levee is now in a condition to function* whenever any flood occurs that reaches the point where the fuse plug levee is intended to function, viz., a gage of 60.5 on the Arkansas City gage. *This has been true for approximately five years*" (Simons, R. 178).

There can be no question as to the *certainty of the operation* of Boeuf Floodway when the predetermined stage of flood waters is reached on the Arkansas City gage.

"A floodway for excess floods is *provided* down the Boeuf River, on the west side of the river. \* \* \* The entrance to the floodway is closed by a *safety plug* section of the levee, at present grade, which is located at Cypress Creek near the mouth of the Arkansas. To *insure* their safety until this section opens, the levees of the Mississippi, from the Arkansas to the Red, will be raised about 3 feet. To *prevent* flood waters from entering the Tensas Basin, *except through the floodway* during high floods, the levees on the south side of the Arkansas will be strengthened and raised about 3 feet as far upstream as necessary" (Doc. 90, Sec. 16, R. 120). This had all been done when respondent filed her suit.

After reciting that the present top of the fuse plug levee is at a gage of only 60.5, and that it has been estimated that floods might come which would produce, if confined, stages of over 74 feet, the engineering plan, now enacted into law, continues: "It is obvious that no attempt should

be made to raise levees to such a height. The practical remedy is to raise the levee grade 3 feet on both sides of the Mississippi below the Arkansas River, to strengthen these levees so that they will not fail from causes other than accident or overtopping, and to preclude overtopping by *insuring* that the water in excess of the capacity of the leveed channel *be spilled out* near the mouth of the Arkansas" (Doc. 90, Sec. 117, R. 123). "The practical means to meet this situation is to spill the water out of the main leveed channel at *selected* points when the stages reach the danger point" (Doc. 90, Sec. 96, R. 123). "The excess *must be spilled* through safety valves when the volume exceeds the safe capacity of the river" (Doc. 90, Sec. 97, R. 123).

"To insure that excess water will leave the main river, a *fuse plug* section of the levee in the vicinity of Cypress Creek *must be kept* at its present strength and at its present grade, viz., 3 feet below the new levee grade. This relatively weak section will be long enough to discharge the *greatest predicted possible excess water* over and above the capacity of the leveed river below" (Doc. 90, Sec. 118, R. 124.) "A flood of a magnitude somewhere between that of 1922 and 1927 *will break it*, turning the excess water down the floodway, which will carry it safely to the backwater area at the mouth of the Red River" (Doc. 90, Sec. 17, R. 120).

"The levees generally will be raised about 3 feet, so that the selected, weaker relief levees will be at about the elevation of the present levee top and will SURELY serve their purpose" (Doc. 90, Sec. 98, R. 123).

*Rivers*" (Col. Oliver, R. 253). "When the crest of the 1937 flood reached the mouths of the Arkansas and White Rivers the discharge from those rivers was 100,000 cubic feet as compared with 1,200,000 cubic feet in 1927" (petitioner's expert Clemens, R. 263). "I do not think the 1937 flood is a proper test of the efficiency of the cut-offs. \* \* \* Had there been water in the Arkansas and White Rivers in 1937, comparable to 1927, the fuse plug levee could not have safely carried the combination of the two floods past the fuse plug without the diversion into the Boeuf Floodway as planned" (Carter, R. 284).

*Volume.* "The momentary peak flow into the Boeuf Basin in the vicinity of Cypress Creek may be 1,250,000 cubic feet per second, the average for about 10 days being about 900,000" (Doc. 798, p. 44, R. 139). "A million cubic feet a second must be taken out of the river" (Gen. Markham, R. 145-146). "Over a million feet has to go out of of there whether anybody likes it or not (Gen. Markham, R. 140-141). "The 1928 Act contemplates a flood of 25% to 30% in excess of the estimated 1927 flood, called the project flood, which would necessitate the escape of more than 1,000,000 cubic second feet of water through the fuse plug levee down the Boeuf Floodway" (Neptune, R. 161-162).

Other than death and taxes, we know of nothing more certain that the ultimate use of the Boeuf Floodway as designed and intended under the present law, and under the physical conditions as they existed when respondent filed her suit on August 11, 1934 (R. 16).

The constant nightmare which has terrified the property owners behind this fuse plug levee since the destruc-

tion authorized by the Flood Control Act of May 15, 1928, became a certainty, and which continues, the dread horror and dismay which has caused inhabitants to flee in panic and which has kept all substantial buyers out of the territory, resulting in the paralyzation and destruction of all normal market values, is the perennial knowledge that this fuse plug sector in the levees *must* "fuse," crevasse, blow-out or be overtopped when enough water gets against it; that it was so designed and intended by petitioner's engineers who have expended fabulous sums of money predicated upon it doing so; and that this continuous flood hazard is utterly unavoidable because it is crystallized into the very law of the land by the Flood Control Act of May 15, 1928. Not only is this imminent danger justified by the law and evident from the official maps of the Jadwin Plan, but *now* any property owner has only to look at the great levees across the river in the State of Mississippi, and to the north and south of petitioner's "fuse plug levee" in order to realize the *physical facts* which make his doom inexorable.

Furthermore, every Chief of Engineers since May 15, 1928, on every appropriate occasion and before every congressional investigation of the subject, has repeatedly assured respondent and her neighbors of the inevitable, ultimate destruction of their property. Even since this case has been pending on appeal, the new Chief of Engineers, Major General Julian L. Schley, has *again* assured the Congress that, notwithstanding every fact in the record in this case, the diversion floodway to the west, south of the Arkansas River, is still *an integral and essential* feature of the plan—not merely an additional factor of safety.

functions are: *Floodways* \* \* \*. These will relieve the main channel of the water it can not carry and lower the floods to stages at which the levees can carry them" (Doc. 90, Sec. 3, R. 119). "The excess must be spilled through *safety valves* when the volume exceeds the safe capacity of the river. *These safety valves* consist of one controlled spillway, several relief or fuse plug levees at present levee grade and one levee of reduced height" (Doc. 90, Sec. 97, p. 23, R. 123). Of these safety valves, the Boeuf Floodway "is the most critical from the viewpoint of flood control" because of the large discharge from the White and Arkansas Rivers (R. 144), and is therefore probably the *most essential*. It is absolutely necessary (Neptune, R. 160).

The United States has paid for flowage rights in the Bonnet Carre Floodway (R. 137). The United States has paid for flowage rights in the New Madrid Floodway (R. 142; *United States v. Hess*, 70 Fed. (2d) 142, 71 Fed. (2d) 78). There is no justifiable distinction, so far as Government liability is concerned, between either of these authorized floodways. The fuse plug spillway which creates the Boeuf Floodway of which "the United States must have control \* \* \* and keep it substantially at its present strength and present height" (Doc. 90, Sec. 120, R. 124), creates a condition which is the same in effect as if the entire existing levee line had been left alone except to cut down the fuse plug levee three feet lower than all adjacent levees (Wonson, R. 173). To property owners on the floor of either of these floodways it is utterly immaterial how the United States created the physical condition which uses each floodway alike for an enormous artificial diversion of flood waters from the main channel of the Mississippi



River. When property by law is put into a definite auxiliary channel of the Mississippi River for use in flood-times, by definite and predetermined design, its market value is destroyed. *Res ipsa loquitur*. The application of common knowledge to an examination of the map of the Jadwin Plan is sufficient to establish this point.

This Court, we submit, will affirm the judgment of the Circuit Court of Appeals which holds: "This comprehensive plan binds together the lands on both sides of the river as parts of the same section of the alluvial valley." *Sponenbarger v. United States*, 101 F. (2d) 506 at p. 512.

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as in the northern and southern sections, had been *completed* at the time of the trial, and were in operative condition prior to the filing of respondent's suit (R. 142-143, 144).

The Chief of Engineers in testifying before the Senate Committee on January 27, 1936, stated: the northern section "is *practically complete* and I think would take super-flood" (R. 147); "down to the Arkansas River there is no trouble in confining the water of the Mississippi between the leveed channels" (R. 147); "the southern section from the latitude of the proposed Morganza Floodway down to the Gulf is practically complete. It is *essentially complete*" (R. 147); "the levees on the south bank of the Arkansas are complete up to full superflood height" (R. 147-148); "all parts of the project works in the middle section except the Boeuf Floodway and the raising of the main river levees adjacent to its head *have, in general, been completed*" (R. 142-143). Floods in the lower Mississippi Valley cannot be successfully controlled without the Boeuf Floodway. *In a superflood there is no question but that the fuse plug levee would crevasse south of the Arkansas River on the main stem of the Mississippi River* (Markham, 1936, R. 148).

"The United States *began actual construction* of the unified, comprehensive project authorized by the Flood Control Act of May 15, 1928, commonly known as the Jadwin Plan, affecting the middle section of the Mississippi River, January 10, 1929, the date of the approval by the President of the recommendations of a Special Board authorized by Section 1 of the Act. The construction work *has gone on continuously since the final approval of the plan on January 10, 1929.*"

"The fuse plug levee is 3 feet lower and approximately just half as large by volume as those other levees constructed by the United States under the 1928 Flood Control Act." "In September-October, 1935, we made an actual survey of the fuse plug levee, and prepared a graph which represents the condition of the levee at the time of the filing of the present suit (see R. 393 and 395). At that time the *weakest point of the fuse plug levee* which would most likely crevasse under the stress of a flood was in the vicinity of Cypress Point revetment, about 2 or 3 miles north of the bottle neck in the vicinity of Arkansas City. A bottle neck means where the levee lines are very close together constricting the floodway width of the river to an extreme amount as compared with the width above and below" (Neptune, R. 158).

"The point on the fuse plug which is now weakest, and which will be *the probable point of crevasse* when tested by a major flood is about Lucca Landing; about 2 miles north of this new set-back levee. Through this crevasse the water would go right into the Boeuf Floodway. This is in the section of the levee which is designed to open up into the floodway.

"When this suit was filed in 1934, the fuse plug levee I have just described was in such condition that it would be overtopped and breached to provide for the escape of flood waters as was designed and contemplated by the Flood Control Act of May 15, 1928; and *that condition still exists*. The fuse plug levee *has been in such operative condition* as contemplated by the Flood Control Act of May 15, 1928, for the *past 5 or 6 years*.

This has all been definitely accomplished, and the fuse plug levee at the head of the Boeuf Floodway will now "surely" SERVE ITS PURPOSE.

"No part of this fuse plug levee breached or crevassed during the 1927 flood" (Neptune, R. 161), but NOW, because of the construction work done by petitioner under the Flood Control Act of May 15, 1928, "Any flood beyond that of a magnitude around 30% less than the 1927 flood, of the type of the 1927 flood, would overtop and crevasse the fuse plug levee. \* \* \* For the past 5 or 6 years any flood approximately 30% less than the 1927 flood would have overtopped and crevassed the fuse plug levee. \* \* \* Under the present law and the conditions resulting therefrom, *it is certain that the fuse plug levee will crevasse* in the event of a flood of the size and type of 1927, and larger. There is no chance of the fuse plug levee holding with the levee lines all around it three feet higher and built to carry three feet more of water than this fuse plug levee. The functioning of the fuse plug levee as contemplated by the Flood Control Act of May 15, 1928, is *certain*" (Neptune, R. 161-162).

"Any flood coming out of the White and Arkansas Rivers joining with that of the upper Mississippi River that can safely pass through the constricted channel of the Mississippi River known as the bottle-neck near Arkansas City, can be safely carried through the widened channel south of the bottle-neck and past the fuse plug levee. *The fuse plug levee would crevasse, if at all, in the upper portion of the fuse plug levee before reaching the bottle-neck*" (Neptune, R. 165).

Mr. Neptune is corroborated by Mr. Wonson (R. 168, 169), and by Mr. Simons (R. 175, 177, 178).

The Mississippi River pays little regard to the estimates of man. However it has been estimated that the Boeuf Floodway would be used, on an average, of once in 12 years (Doc. 90, Sec. 119, R. 124; Doc. 1, p. 19, R. 143). But no man dare guess *what year* the flood will come. Respondent's property is subject to the flood menace and hazard *every year*. It may come *any year*. "The magnitude and frequency of future floods are not predictable in America" (Wonson, R. 172). "It is well to note at this point that *past estimates of floods have been much in error by under-estimation*" (Doc. 798, p. 2, R. 137). "The confinement of the Mississippi River within levees and the great development of drainage systems in recent years have *raised flood stages materially* and this raising has exceeded estimates made in the past" (Doc. 90, Sec. 96, R. 122). Petitioner's expert Mathes sees "*nothing unusual* in the fact that there have been *three successive* floods in the years 1934, 1935 and 1936" (R. 245).

\* The fuse plug levee would have breached, and the Boeuf Floodway would have functioned, during the flood of 1937 out of the Ohio River, if it had been materially augmented by floods at the same time out of the upper Mississippi, or out of the Arkansas and White Rivers, such as the combination of floods in 1927.

"Had the large storage basin at the mouths of the Arkansas and White Rivers been full in 1937 when the crest of the Ohio flood reached the latitude, as they were in 1927, the fuse plug levee would have overtopped" (Neptune, R. 166). "When the 1937 flood was coming I told the people of Arkansas and Louisiana that there was no danger whatever south of the Arkansas River *because of the emptiness of the reservoir area back up the Arkansas and White*



### POINT III.

**BOEUF FLOODWAY is in OPERATIVE CONDITION. The authorized GUIDE LEVEES ARE IMMATERIAL to respondent's right of action. Certainty of Operation.**

Regardless of all theory and argument to the contrary, respondent's property had actually been taken for a floodway prior to the filing of her action. It is on the floor of a floodway today, and will doubtless continue subject to the constant menace of use as a floodway for an indefinite future period of time. It is true that the guide levees which were intended to be constructed inland, both east and west of respondent's property, for the purpose of limiting the area to be flooded, and for the purpose of protecting areas outside of the designated pathway of the diversion, have not been constructed; but this fact is wholly immaterial both (1) so far as the destruction of the market value of respondent's property is concerned, and (2) so far as the functioning of the fuse plug levee as a safety-valve spillway is concerned. The only difference in the Boeuf Floodway as originally intended and now, is that it was originally intended that the floodway should be controlled by guide levees on either side, whereas now the floodway is uncontrolled save by the parallel natural ridges which carry the water in a southerly direction to the back-water area at the mouth of Red River. None of this has any material effect on respondent's property. The failure of the Government to build the guide levees simply means that a little more area will be used as a floodway than was originally intended. Respondent's property lies squarely in "the mouth of the gun" at the head of the floodway, and she is not concerned with what becomes of the water after it has washed her property away.

The Court will note the distinction between the words "*spillway*" and "*floodway*." The spillway is properly the fuse plug levee, safety valve, or weaker relief levee which is overtopped or gives away so as to spill the water out of the main channel. The floodway is the pathway flooded by this water after it has been spilled out over the spillway.

The District Court erred in stating in its opinion that: "The Government did not proceed with the construction of the Boeuf Floodway" (R. 380), and "that floodway is not now and never has been in an operative condition" (R. 388). See Assignments of Error Nos. 233, 238 (R. 112-113) which were properly corrected by the Circuit Court of Appeals.

The District Court erroneously cited as authority for its statement Com. Doc. 1, Sec. 9, which states: "all parts of the project works in the middle section, except the Boeuf Floodway and the raising of the main river levees adjacent to its head, *have in general been constructed*. Because of local opposition the construction of the Boeuf Floodway levees have not been undertaken" (R. 380). The Court will notice that this statement relates *only* to the *completion* of the project. It has no reference whatever to the *beginning* of the work on the project as a whole; nor does it suggest that the fuse plug *spillway* has not been completed. The fact that the absence of the protection or guide levees permits floods to extend over more area than was contemplated does not in the least lessen the flood hazard in the Boeuf Floodway to which respondent's property is constantly subjected (See R. 85).

The fact is that substantially all work of construction in the middle section, *including the Boeuf Spillway*, as well

"Plaintiff's property is practically in the middle of the entrance of the Boeuf Floodway as designed by the Flood Control Act of May 15, 1928" (Neptune, R. 159):

"Approximately 85% to 90% of the work on that levee system had been *completed in the fall of 1934*; and approximately 90% to 95% of the system of the main river is completed at the present time" (Neptune, R. 157).

This testimony is corroborated by Wonson, R. 167, 168, 170, 171; and by Simons, R. 175, 176, 177, 178; and by petitioner's chief expert witness Mathes, R. 246, 247, 248, 250; and by General Ferguson, General Markham, and Col. Oliver (R. 249); and Capt. Seybold (R. 258). *It is an indisputable physical fact.*

"The escape of flood waters through Boeuf Basin is, and for a number of years has been, an essential feature of this Jadwin Plan *which is in operation.*" (Petitioner's chief expert Mathes, R. 148).

"The general location of *plaintiff's property is now in one of these particular floodways, at the most critical point of the river just below the mouth of the Arkansas.* . . . The plaintiff's property has been on the floor of that floodway, very near its head, since the passage of the Flood Control Act of May 15, 1928" (Mathes, R. 250).

"And *the people within the floodway itself are subject to flood right now*, and they are not going to have their flood menace actually increased by the plan which we propose" (District Engineer Oliver in April, 1935, R. 249).

*The guide levees are immaterial* as affecting appellant's property, or the designed diversion (Doc. 90, Sec. 118, R. 124).

"The restriction of flow by means of *side or protection levees in these basins is not essential* to the escape of the flood waters but is advisable for the protection of said lands, and for the protection of life and property, where the cost is not excessive" (Doc. 798, p. 26, R. 138). "*The protection levees are not at all essential* to the proper functioning of the plan in the adopted project but were included merely to furnish local protection or reclamation" (Doc. 798, p. 47, R. 139). "With regard to the adopted project attention must be invited to the protection levees in the Boeuf and Atchafalaya Basins which have been protested by local interests and to the fact that *these levees are not essential to the proper functioning of the plan* but are merely to afford the maximum amount of local reclamation in the basin which was thought economically justifiable" (R. 139).

"The construction of the *guide levees* in the Boeuf Floodway is in *no way essential* to the functioning of the *fuse plug levee*. They limit the amount of land that may be subject to floodway flow. *They do not limit the entrance*. So far as damage to the plaintiff's property is concerned, the construction of these guide levees would have very little effect one way or the other" (Neptune, R. 162-163). "The guide levees on either side of the Boeuf Floodway as prescribed by the Flood Control Act of May 15, 1928, have not been constructed. Their construction would have no substantial effect upon the plaintiff's property. *The guide levees are not necessary to the operation of the fuse plug levee as contemplated by the 1928 Act*. The fuse plug levee is now serving the purpose for which it was designed under that Act. This has been true for 5 or 6 years" (Wonson, R. 170-171). "The guide levees

of the Federal Government as being only that of a gratuitous contributor, *without responsibility or liability*, to the states and local interests who were charged with the prime duty and burden of flood control. *No compulsion* of the states, local interests, or individual property owner was involved.

The year 1927 marks the greatest flood of record in the lower valley. Flood levels attained unprecedented heights and losses exceeded those ever before experienced in the valley. For the first time in history, completed and seasoned levee works constructed to the standards recommended by the Mississippi River Commission proved of inadequate height and therefore failed. This flood disaster again attracted National attention and sympathy. Long hearings were held by the Flood Control Committee of the House of Representatives of Congress and many plans were advanced for the effective control of floods in the valley. It early became apparent that National assistance in flood control work would be extended to an extent unprecedented in the history of the United States, and perhaps in the history of the world. Two noteworthy plans for flood control were submitted to Congress: that of the Mississippi River Commission and that of the Chief of Engineers. Both plans provided for the repair, strengthening and extension of the existing levee system, and the construction of *floodways* to accommodate flood waters in excess of the capacity of the leveed channel of the main river, *by the Federal Government*, the petitioner in this case. After months of consideration the plan of the Chief Engineers (Jadwin Plan) was adopted by Congress in the *Flood Control Act of May 15, 1928*.



The passage of this law marks the end of the first period of the history of the Mississippi River Commission, since the Act effected certain definite changes in the organization, duties and jurisdiction of that body. In its technical features, this Flood Control plan was conceived on a scale far grander than any theretofore proposed, and it is based on concepts and theories somewhat different from those underlying previous plans. But the most profound and fundamental change made by this Act in flood control legislation, and in the *corpus juris* of flood control works, is that, *for the first time in history*, the Congress deliberately and expressly recognized and *assumed national responsibility and liability* for the solution of this national problem.

This period ending with the passage of the Flood Control Act of May 15, 1928, was marked by exhaustive studies looking toward the development of proper methods of flood control *for use by the National Government* when the United States was ready to assume national responsibility. Vol. I "Mississippi River Flood Control and Navigation," *supra*, pp. 13-20.

D. *Operations since May 15, 1928.* By this Act the Mississippi River Commission ceased to be an executive body and became only an advisory and consulting body. The responsibility for the prosecution of the work was definitely placed upon the Chief of Engineers, War Department, representing directly *the United States*, responsible directly to the Congress. Vol. I, "Mississippi River Flood Control and Navigation," p. 20.

"The alluvial valley of the Mississippi River may justly be called the cradle of *national* flood control. Long be-

Acts were passed as a gratuity to the states for the purpose of assistance *without responsibility*. The failure of the states to carry out the purposes of these acts doubtless caused the Federal Government eventually (May 15, 1928) to assume the responsibility for the protection of this enormous and important national acreage against the floods which are gathered from the extremities of the Nation. Vol. I "Mississippi River Flood Control and Navigation," *supra* pp. 7-13.

C. *Operations of the Mississippi River Commission to 1928.* The national need for improvement for navigation and flood control was generally recognized by the year 1879. The necessity for co-ordination of engineering operations through a centralized organization was apparent. Reports submitted from time to time during the period just ended had stressed the magnitude of the problem and had discussed most of the methods of flood control which have since been advanced. However, the Congress was still unwilling to assume responsibility for the task, with resulting liabilities. It had reached the point of being willing to advise and supervise, with some contribution toward costs.


In 1879 a bill was introduced in Congress providing for the creation of a Mississippi River Commission. The opponents of the bill based their objections mainly upon the contention that the flood protection of alluvial lands was the sole responsibility of the states and local communities. They feared that the passage of the law would result in the ultimate expenditure of the National Government of vast sums for flood protection in the Mississippi valley. The bill became law June 28, 1879, creating the Mississippi River Commission consisting of seven members appointed

by the President. (21 Stat. 37; Title 33, U. S. C. A., Secs. 641, et seq.) The Commission was charged with the preparation and consideration of *plans* to improve the river channel, protect its banks, improve navigation, prevent destructive floods, and promote and facilitate commerce and the Postal Service. Although the Commission's jurisdiction was to become extensive, its powers and functions were strictly defined. The Commission was given much executive authority and money for the purpose of improving *navigation*, but the Congress carefully avoided any national responsibility for flood control. The Commission could only advise, and supervise, and make contributions toward flood control work done by the states and local interests (levee districts formed and financed by the local property owners).

The so-called First Flood Control Act, approved March 1, 1917 (39 Stat. 950; Title 33 U. S. C. A. Sec. 701), was carefully drafted in strict conformity to this national policy of non-liability on the part of the United States, which had then become a part of the *corpus juris* of the land by judicial decisions. See *Jackson v. United States*, 230 U. S. 1, 33 S. Ct. 1011, 57 L. ed. 1363; and *Hughes v. United States*, 230 U. S. 24, 33 S. Ct. 1019, 57 L. ed. 1374, both decided June 16, 1913; and *Cubbins v. Mississippi River Commission*, 241 U. S. 351, 36 S. Ct. 671, 60 L. ed. 1041, decided June 5, 1916.

The Second Flood Control Act of March 4, 1923 (42 Stat. 1505; Title 33 U. S. C. A. Sec. 701) extended the jurisdiction of the Commission from Head of Passes to Rock Island, and up the tributaries and outlets of the Mississippi River so far as they might be affected by Mississippi flood waters, but still carefully preserved the status

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States. His report on the Mississippi River was the most complete one made up to this time, and has exercised a very considerable influence on later thought. In fact, it is significant to note here that as early as 1852 the Congress was advised by Ellet's report (contained in Committee Document No. 5, 70th Congress, 1st Session), that in order to control the floods of the Mississippi River a floodway south of the mouth of the Arkansas River, west of the Mississippi, practically the same as the Boeuf Floodway of the 1928 Act, *would eventually be necessary*. See Plate LXVII, Vol. III "Mississippi River Flood Control and Navigation," *supra*.

Ellet stated in his report that the *floods* in the alluvial valley of the Mississippi River *would increase in frequency and extent* with the increase in cultivation in the valley and the extension of the levee system. Vol. I "Mississippi River Flood Control and Navigation," *supra*, at p. 9.

Congress at the time was apathetic.

By Act of Congress, approved September 30, 1850, \$50,000 was appropriated for the preparation of a topographic and hydrographic survey of the Delta of the Mississippi; and for investigations to determine the most practical plans for flood control and for navigation improvement at the river mouth. The final report of this survey, commonly known as the Delta Survey, was submitted in 1861. Again it was pointed out that ultimately a *floodway* would be necessary on the west bank of the Mississippi River, extending southward from the general vicinity of the mouth of the Arkansas River. See Plate LXVIII, Vol. III "Mississippi River Flood Control and Navigation," *supra*.



It is rather startling to see how closely these floodway lines, proposed as long ago as 1852 and 1861, in Arkansas follow the present lines of the Boeuf Floodway, and the proposed Northern extension of the Eudora Floodway, as finally actually authorized to be constructed by the Flood Control Act of May 15, 1928. The final action of the Congress was the culmination of the deliberations of experts for more than 75 years. Compare Plates LXVII, LXVIII, and LXIX, Vol. III "Mississippi River Flood Control and Navigation," *supra*.

The Civil War period was attended by a cessation of work on the river. Levees were allowed to fall into disrepair and the floods of 1862 and 1865 did great damage to the levee system which had been constructed by local property owners. The year 1874 found the levee system in the lower valley in a condition still worse than that of 1859 when the flood of 1859 caused a total of 32 crevasses. The flood of 1874 did considerable damage in the valley, and as a result a board of engineers known as "Levee Commission" was directed to make an examination of the levee system and to submit a plan for the reclamation of the Alluvial Valley. Congress authorized certain surveys of transportation routes to the seaboard.

The year 1879 marks the end of the period of Federal operation prior to the creation of the Mississippi River Commission. This period was characterized by many voluminous studies and reports, of which those of Ellet and the Delta Survey are outstanding. This period is marked by the first effort on the part of the Federal Government to assist the states in the solution of the flood control problem, but the Congress very carefully refrained from assuming any national responsibility or liability therefor. The Swamps

As late as March 30, 1938, General Schley assured the Congress, the respondent, and this Court, that: "Nothing has developed which makes it appear that our comprehensive report of April 6, 1937, is not to be retained as the fundamental solution of flood control on the Mississippi" (which report of April 6, 1937, Sec. 7, requires "*floodways below the confluence of the White and Arkansas Rivers to carry flood waters in excess of the capacity of the levee system*"). "*We still have to take the water out.*" If you had a flood in excess of the present levee capacity of the river, the means of safety provided is the *blowing of the fuse plug levee south of the Arkansas*. "That is the reason it was left at its lower height *for that purpose*. That was the original purpose, and goes back as far as the report of 1928, the Jadwin report. \* \* \* *A diversion channel in the middle section is necessary.*" (HEARINGS, House Committee on Flood Control, March 30, 1938, pp. 9, 10, 17, 18, 20).

On March 31, 1938, General Harley B. Ferguson, as President of the Mississippi River Commission, testified before the House Committee on Flood Control in Washington: "*The adopted project, as we refer to it, generally means the project approved in the Flood Control Act of May 15, 1928, which contemplates the Boeuf diversion in the middle section. The main line levees were to be raised substantially 3 feet, and that work has been accomplished. \* \* \* We now have a floodway that is not leveed. With that low levee on that side it would break before it does on the other side. \* \* \* A large flood would not destroy the protective work we have now because they would blow a hole in it (the fuse plug levee) and the rest would all be saved. \* \* \* We have spent \$600,000,000 on this river. We could take care of a major flood of 3,200,000 cubic second feet if*

*the floodway was operating.* That is what we set out to do by the legislation. To limit the places where the water goes away would not be wise. We are spending an awful lot of money. Since we made that estimate, we have had great floods coming out of the Ohio, and we have had rain-falls out West away beyond all records. The freeboard we think we should have, and what we have contended for along there, is five feet. We have contended for a *five-foot freeboard.*" (HEARINGS, House of Representatives, Committee on Flood Control, March 31, 1938, pp. 36, 48, 53, 54, 55).

On March 22, 1939, *after* the decision of the Circuit Court of Appeals in this case, the Chief of Engineers again announced that the Jadwin Plan, which he again calls "the comprehensive project," necessarily including the fuse plug levee spillway at the head of the Boeuf Floodway, is actually operating "*true to its design.*" He publicly announced:

"As you know, flood control work in the alluvial valley is being prosecuted under authorities contained in the Flood Control Acts of May 15, 1928, June 15, 1936, and June 28, 1938, which authorize the appropriation of \$637,000,000 for this purpose. . . . highly satisfactory progress has been made. The valley has enjoyed 12 long years without accidents and overflows, despite the fact that several high waters have occurred with crests that exceeded those of former floods which caused great damage. Although *the comprehensive project has operated true to its design*, let us not be lulled into a false sense of security, for construction has not yet reached the point that would enable this project to protect the valley lands against the maximum predicted flood. Such a flood may not occur, but it is

prudent to prepare for such an eventuality as rapidly as practicable. The Department is therefore vigorously prosecuting those works to which local interests have agreed and is also strengthening the existing works wherever the need has been indicated." (Congressional Record of March 22, 1939, Appendix, p. 4415).

Does this not demonstrate beyond cavil that the District Court labored under a complete misapprehension of the actual, existing physical fact when it erroneously stated "that floodway (Boenf Floodway) is not now and never has been in an operative condition?" (R. 388).

The judgment of the Circuit Court of Appeals on this point is clearly right.

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## POINT IV.

### FEDERAL RESPONSIBILITY

**HISTORY.** "The history of the Lower Mississippi River for flood control and navigation falls naturally into four periods.

"The first period may be described as that of discovery and settlement. It begins with the discovery of the river and ends with the beginning of Federal river engineering operations.

"The second period covers the history of investigations and engineering operations by the Federal Government up to the creation of the Mississippi River Commission in 1879.

"The third period embraces the operations of that Commission from its creation until the passage of the Act of May 15, 1928.

"The fourth and last period begins with the reorganization of the Mississippi River Commission, as provided for in the Act of May 15, 1928, and covers the engineering operations called for by that law." Vol. I "Mississippi River Flood Control and Navigation," by U. S. Army Engineers, War Department, United States Waterways Experiment Station, Vicksburg, Mississippi, May 1, 1932, at p. 1.

**A. *Discovery and Settlement.*** Credit is popularly accorded to Hernando de Soto for being the first white man to discover the Mississippi River, which the De Soto expedition first saw on May 8, 1541. There is however much evidence to show that the existence of the river was known



to other earlier explorers. Indeed, Columbus himself may have been the first European to observe this river on his fourth voyage which began in 1502.

The city of New Orleans was founded in 1717. The building of the Mississippi River levees began with the first settlements in the lower alluvial valley. The engineer who laid out the city of New Orleans planned a dike or levee to protect the city from overflow. It was extended rapidly by the individual property owners for miles above and below the city. The extension of these levee lines kept pace with the establishment and growth of settlements. Each planter was required to complete the levee along his own river front. By 1844 these levees were continuous, though often ineffective, from 20 miles below New Orleans to the mouth of the Arkansas River on the right bank, or west side of the river.)

By 1820 the period of discovery and settlement had come to a close. The Mississippi River was now entirely within the territorial limits of the United States. The lower river valley was comparatively well settled in its southern areas. A levee system for the control of its floods had definitely begun. National attention was directed to the river. "Mississippi River Flood Control and Navigation," *supra*, at pp. 1-6.

B. *Operations of Federal Government prior to 1879.* Federal operations on the Mississippi River date from 1820. The attention of the National Congress was directed first to the requirements of navigation, rather than to the problem of flood protection. In 1820 Congress appropriated the sum of \$5,000 for the preparation of a survey, maps and charts of the Ohio and Mississippi Rivers with a view to the improvement of these rivers for navigation.

By 1845 the demand for navigation improvement had apparently crystallized into a definite problem demanding an engineering solution. In 1845, before a convention held in Memphis, Mr. John C. Calhoun, the presiding officer, made a noteworthy speech in which he advanced the view that *both flood control* protection and navigation improvements were *national* rather than local problems.

The floods of 1849 and 1850 created widespread damage and increased the growing national interest in the problem of flood control. By the Swamp Acts of 1849 and 1850, the National Congress granted *to the several states* all unsold swamp and overflowed lands within their limits. Under the provisions of the acts, funds accruing from the sale of these lands by the states were to be applied *by the states* to the prosecution of drainage, reclamation, and flood control projects. As might have been expected, this attempt to secure effective flood protection *failed*, due primarily to the lack of co-ordination of the work among the different states and districts. While this was a step in the right direction, no effective steps were taken to co-ordinate these laws among the states. Such progress as was made under the Swamp Acts was ineffective. As a national flood control measure the laws were a signal failure. ◊

Notwithstanding the fact that the National Government was actually doing nothing to protect the valley from floods, the interest of Congress in the problem nevertheless continued. Pursuant to an Act of Congress, the Secretary of War in 1850 directed Mr. Charles Ellet, Jr., an engineer, to make surveys and reports on the Mississippi and Ohio Rivers with a view to the preparation of adequate *plans for flood prevention* and navigation improvement. Ellet was the pioneer in flood control engineering in the United

000,000, it necessarily follows that not only has respondent's property been taken, but furthermore her future right to defend her property has been seriously restricted and impaired, if not practically destroyed. The right of self-defense, including the right to defend one's property, is both elemental and fundamental in natural law. Constitutional or statutory declarations of this prime principle of natural law are unnecessary. Self-preservation is indeed the first law.

It cannot be fairly doubted that the petitioner United States has exercised its sovereign right of eminent domain to the detriment and restriction of this right of respondent to defend her property. See *Cubbins v. Mississippi River Commission*, *supra*, 60 L. ed. 1041, at p. 1047, *et seq.*

Nor can it be doubted that the Congress legally exercised this sovereign right. The Congress has complete control over the navigable rivers of the United States. *Scranton v. Wheeler*, 179 U. S. 141, 21 S. Ct. 48, 45 L. ed. 126, at p. 136.

"It is for Congress to determine when its full power shall be brought into activity, and as to the regulations and sanctions which shall be provided."

*United States v. Chandler-Dunbar W. P. Co.*, 229 U. S. 53, 33 S. Ct. 667, 57 L. ed. 1063, at pp. 1075-1076.

*Gilman v. Philadelphia*, 3 Wall. 713, 724, 18 L. ed. 96, at p. 99.

*Wisconsin v. Duluth*, 96 U. S. 379, 24 L. ed. 668, at p. 670, and 671-672.

That Congress has finally "brought its full power into activity" has exercised its "exclusive jurisdiction," and by

the passage of the Flood Control Act of May 15, 1928, has deliberately assumed full and *exclusive* control of the fuse plug levee, is manifest and indubitable. This *fact* certainly cannot be doubted by anyone familiar with the Act, with the provisions of House Document No. 90 which the Act adopts and thereby enacts into law, and with the congressional debates in explanation thereof.

The Flood Control Act of May 15, 1928, adopts and enacts into law the following Congressional regulations:

"The United States *MUST* have *control* over the Cypress Creek levee and *keep it* substantially at its present strength and present height." Doc. 90, Sec. 120, R. 124.

"A flood way for excess floods is, *provided* down the Boenif River, on the west side of the river. \* \* \* The entrance to the flood way is closed by a *safety plug section* of the levee, at present grade, which is located at Cypress Creek, near the mouth of the Arkansas. To *insure* their safety until this section opens, the levees of the Mississippi, from the Arkansas to the Red, will be raised about 3 feet." Doc. 90, Sec. 16, R. 120.

"The levees generally will be raised about 3 feet, so that the *selected, weaker relief levees* will be at about the elevation of the present levee top and will *surely* serve their purpose." Doc. 90, Sec. 98, R. 123.

"The practical remedy is to raise the levee grade 3 feet on both sides of the Mississippi below the Arkansas River, to strengthen these levees so that they will not fail from causes other than accident or overtopping, and to preclude overtopping by *insuring that the water in excess of the capacity of the leveed channel be spilled out near the mouth of the Arkansas.*" Doc. 90, Sec. 117, R. 123.

v. *United States*, 230 U. S. 24, 33 S. Ct. 1019, 57 L. ed. 1374; and other decisions prior to the Flood Control Act of May 15, 1928, relied on by petitioner. This plan and right of local self-defense was fundamentally changed by the Flood Control Act of May 15, 1928.

Under the present law, the Jadwin Plan "*limits*" the amount of flood water carried in the main river \* \* \* and *sends* the surplus water through lateral *floodways*" (Doc. 90, Sec. 3, R. 119). These words "*limits*" and "*sends*" imply *human* interference with natural conditions. Notice how this element of human choice and artificial direction is reflected by the language used throughout the entire description of the engineering plan adopted. For instance: "The water which can not be carried in the main channel with the levees at reasonable height *must be diverted*" (Doc. 90, Sec. 7, R. 119); "the floodways *allotted*" (Doc. 90, Sec. 8, R. 120); "a floodway for excess floods is *provided* down the Boeuf River" (Doc. 90, Sec. 16, R. 120); "to *insure*" (Doc. 90, Sec. 16, R. 120); "to *prevent* flood waters from entering the Tensas-Basin, *except through the floodway*" (Doc. 90, Sec. 16, R. 120); "the practical means to meet this situation is to *spill the water out* of the main leveed channel at *selected* points when the stages reach the danger point" (Doc. 90, Sec. 96, R. 123); "the excess *must be spilled* through safety valves" (Doc. 90, Sec. 97, R. 123); "the *selected*, weaker relief levees" (Doc. 90, Sec. 98, R. 123); "to *preclude* overtopping by *insuring* that the water in excess of the capacity of the level channel *be spilled out* near the mouth of the Arkansas" (Doc. 90, Sec. 117, R. 123); "to *insure* \* \* \* a fuse plug section \* \* \* *must be kept*" (Doc. 90, Sec. 118, R. 124); "the Boeuf River bottom is *selected* for this diversion" (Doc. 90, Sec. 119, R. 124); "the



United States *must* have control over the Cypress Creek levee and *keep* it substantially at its present strength and present height" (Doc. 90, Sec. 120, R. 124); "the draw down from the Cypress Creek relief levee into the Boeuf River diversion below makes it *possible to protect* the lower part of this section of the levee" (Doc. 90, Sec. 127, R. 124-125); "the fuse plug levee *decided upon*," a human choice (Doc. 90, Sec. 134).

"The word 'diversion' used in the Flood Control Act of May 15, 1928, I understand to mean the *taking* water out of the main channel of the Mississippi River and *passing* it laterally into a detour or route around the main channel in order to *handle* the amount of water in excess of the capacity of the levee system below the point of diversion. . . . A *diversion channel* on the west side of the Mississippi River in the middle section is a specific requirement of the 1928 Act, and is *absolutely necessary* for flood control under the provisions of that Act" (Neptune, R. 160). "There is a difference between a *natural outlet* from the river and an *artificial diversion*. A natural outlet is one that exists in a state of nature, as may be found by a creek entering the river which at times of flood receives the flood flow of the river; whereas a *planned diversion* is an area artificially set up to insure that at predetermined stages water will pass through the protecting work, such as in this case the levee line (Wonson, R. 171).

In discussing the possibility of the Eudora Floodway as a substitute for the Boeuf Floodway, involving the identical principal of legal right in so far as the property owner is concerned, General Markham, then Chief of Engineers, in January, 1937, frankly told the Congress that such a floodway involved a *deliberate taking* of private property for

public use for which compensation must be made (R. 145-147). "The only thing the United States is proposing is that instead of having a sporadic, indefinable crevasse somewhere—and that is what we have always had in the past—we *definitely put it down with prediction, and pay the flowage for that purpose*" (Markham, R. 146-147). "We are *taking* these floodways and *physically*, by the work of the United States, *directing* these additional flood waters over particular property, and *that creates a Federal obligation*" (Markham, R. 149). "*We are physically, deliberately putting additional flood waters down in a certain territory, and thus deliberately creating an obligation for the acquirement of those flowage rights, believing that is the proper course for getting a diversion so that the whole river below will be protected in this, the only way we know how to protect it, confining it to a specific floodway*" (Markham, R. 150).

All of the foregoing had been completely accomplished by the creation of the fuse plug levee at the head of the Boeuf Floodway, as a physical fact, before respondent's suit was filed.

2. *Federal control over the fuse plug levee which creates the Boeuf Floodway.*

The District Court erred in refusing respondent's requested Conclusion of Law No. 56 (R. 348) which correctly declares: "Since January 10, 1929, the United States has had and exercised the complete legal right of supervision and control over the fuse plug levee at the head or entrance of the Boeuf Floodway for the purpose of keeping it as a fuse plug levee to function as designed, intended, contemplated and authorized by the Flood Control Act of May 15,

1928 (Doc. 90, Secs. 16, 98, 117, 118, 120 and 149; Sec. 9, Flood Control Act of May 15, 1928, Title 33 U. S. C. A., Sec. 702i; 30 Stat. 1152, Title 33 U. S. C. A., Sec. 408; 39 Stat. 950, Title 33 U. S. C. A., Sec. 701; 42 Stat. 1505, Title 33 U. S. C. A., Sec. 702; *Houck v. United States*, 201 Fed. 862; *Cape Girardeau & T. B. T. R. Co. v. Jordan*, 201 Fed. 868),” R. 348-349.

The District Court erred in stating: “The landowners, prior to 1928, had no right to elevate the established grade (R. 388). Equally erroneous is the further statement of the District Court that: “There is nothing in the Act that restricts the privilege of property owners to participate in a ‘flood fight’ by supporting the river front levee, when it is endangered” (R. 388).

The Circuit Court of Appeals corrected these errors of law, 101 F. (2d) at p. 510.

Prior to the Flood Control Act of May 15, 1928, the Mississippi River Commission established grades and sections of levees as being ideals which local levee districts should strive to attain, but they were *not compulsory*. No law can be cited to support the erroneous statements of the lower Court just quoted. See R. 89-90. Prior to 1928 the Mississippi River Commission had no authority or control whatever over the construction or maintenance of levees save the right to refuse to co-operate with local levee districts in the construction of levees by contribution of Federal funds unless the local levee districts would agree to recommendations made by the Mississippi River Commission. See Title 33 U. S. C. A., Secs. 701, 702. There was nothing in any of these Federal laws prior to 1928 which prevented property owners from building up the local levees

during flood-times, in a flood fight, just as high as was physically possible (Neptune, R. 164; Simons, R. 178-179). That is how the Arkansas property owners forced the crevassing of the levees on the east, or Mississippi side, during the 1927 flood.

BUT, now, by law this it completely reversed. This is why in the very beginning of his description of the proposed new engineering plan General Jadwin recommended the reorganization of the Mississippi River Commission, and "*Federal control over structures within natural floodways*" (Doc. 90, Sec. 2). This is why legislation was necessary: "Prohibiting any obstruction not affirmatively authorized by Congress to the flood discharge capacity of the alluvial valley of the Mississippi River below Cape Girardeau and providing that *it shall not be lawful to build or commence the building of any levee or other structure in said alluvial valley or in any floodway provided therein unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War*" and further "Providing that *penalties and procedure applicable to violation of the laws for the protection and preservation of the navigable waters of the United States enacted in sections 12 and 17 of the river and harbor act of March 3, 1899, shall apply to violations of the above provisions of law.*" (Doc. 90, Sec. 149, R. 126).

This is why, pursuant to said essential recommendations, the Congress did, in the Flood Control Act of May 15, 1928, section 9 (R. 119), make the penal provisions of Title 33 U. S. C. A., Secs. 408 and 411 (R. 133-134), applicable to the Boeuf Floodway, and to the fuse plug levee at its head. Thus did Congress intentionally *destroy respondent's right of self-defense*, that is, her right to defend her

property against the flood menace of the Mississippi River. Senator Jones, Chairman of the Senate Commerce Committee in charge of the Bill, frankly declared: "Section 9 is *intended* to carry out the provisions of our general river and harbor legislation with reference to the creation of obstructions unless affirmatively authorized by Congress, *to provide penalty* for violation of it." (69 Cong. Rec., Part 5, p. 5487.

This "safety plug section" (Doc. 90, Sec. 16, R. 120), commonly called the fuse plug levee, is the very keystone and fundamental characteristic (Doc. 90, Sec. 3, R. 119) of the Jadwin Plan. The spillway site is the *sine qua non*, absolutely essential for the success of the Jadwin Plan, the present law (69 Cong. Rec., Part 1, p. 765). Without this weaker relief levee as a safety valve (Doc. 90, Sec. 134, Doc. 90, Sec. 98, R. 123), there would be no Jadwin Plan, and the Government has squandered its \$325,000,000 (Sec. 1 of 1928 Act), aimlessly, foolishly, futilely and without justification. This is why.

"The United States *MUST* have *control* over the Cypress Creek levee" (Doc. 90, Sec. 120, R. 124).

This is why every Chief of Engineers continues to insist: "The levee at the head of the floodway is, under the plan, *to be KEPT* at its prior height and condition *to form a fuse plug* for the relief of such extraordinary floods. All other levees are to be raised and strengthened so as to afford protection *except to the lands in the floodway* under such conditions" (Doc. 1, p. 3; Sec. 8, R. 142).

The Boeuf Floodway is as separate and independent a part of the single, comprehensive Jadwin Plan as the heart is a separate and independent organ of the human body.



"To insure that excess water will leave the main river, a *fuse plug* section of the levee in the vicinity of Cypress Creek must be kept at its present strength and at its present grade, viz., 3 feet below the new levee grade. This *relatively weak section* will be long enough to discharge the greatest predicted possible excess water over and above the capacity of the leveed river below." Doc. 90, Sec. 118, R. 124.

"The Boeuf River bottom is *selected* for this diversion because it is the most suitably located to receive the water, is the most direct route, has the best width, and covers largely undeveloped swamp land." Doc. 90, Sec. 119, R. 124.

"In considering *the plan* for control of the Mississippi much study was given to providing a flexible feature such as *safety-valve spillways* over the levees to discharge water that might possibly come in excess of any predicted: *The fuse-plug levees decided upon* for the two lower sections of the river gave the flexibility desired and *made unnecessary additional safety valves* at this time." Doc. 90, Sec. 134.

"I further recommend that *legislation* be enacted: (a) *Prohibiting any obstruction* not affirmatively authorized by Congress to the flood discharge capacity of the alluvial valley of the Mississippi River below Cape Girardeau and providing that it shall not be lawful to build or commence the building of any levee or other structure in said alluvial valley, or in *any flood way* provided therein unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War. (b) Providing that the penalties and procedure applicable to violations of the laws for the protection and preservation of *the navigable waters*

of the United States, enacted in sections 12 and 17 of the river and harbor act of March 3, 1899, shall apply to violations of the above provision of law." Doc. 90, Sec. 149, R. 126.

Section 9 of the Flood Control Act of May 15, 1928, as recommended, does provide:

"The provisions of Sections 13, 14, 16, and 17 of the River and Harbor Act of March 3, 1899, are hereby made applicable to all lands, waters, easements, and other property and *rights* acquired or constructed under the provisions of this Act." Title 33, U. S. C. A., Sec. 702(i).

Section 14 of said Act of March 3, 1899, provides:

"It shall not be lawful for any person or persons to *take possession of, or make use of for any purpose, or build upon, alter, \* \* \** or in any manner whatever *impair the usefulness of any \* \* \* levee, \* \* \** or other work built by the United States, or \* \* \* used in the construction of such work *under the control of the United States*, in whole or in part, for the preservation and improvement of any of *its navigable waters, or to prevent floods, \* \* \** Provided, That the Secretary of War *may \* \* \** grant permission for the temporary occupation or use of any of the aforementioned public works *when in his judgment such occupation or use will not be injurious to the public interest.* (March 3, 1899, c. 425, Sec. 14, 30 Stat. 1152.)" Title 33 U. S. C. A., Sec. 408, p. 431.

The Federal Courts have already applied this criminal statute to levees built far inland from the main channel of the Mississippi River. *Houck v. United States*, 201 Fed. 862, 120 C. C. A. 200; *Cape Girardeau & T. B. T. R. Co. v. Jordan*, 201 Fed. 868, 120 C. C. A. 206.

fore floods on smaller rivers were of more than local significance, the frequent and devastating overflows of the Mississippi itself were attracting *national* attention which early expressed itself in the form of financial help. As early as 1824, Federal funds were allotted toward the control of floods on that river and, after 1881, these amounts were increased steadily until in 1928 Congress adopted a *comprehensive plan to be constructed at Government expense. At this time, some opponents of this plan suggested the abandonment of the valley to save money, but the Nation realized that the inhabitants of the Delta should not give up the fertile lands that have become the agricultural backbone of the Nation.* It has been stated that the losses from the flood of 1927 touched *the whole Nation* and subtracted something from the wage or income of every worker, whether he lived in a mill town in New England or tilled the soil in Kansas. *The project authorized by Congress in 1928, with subsequent modifications, is now known as the Army engineer plan. Thus, under the jurisdiction of the War Department, the comprehensive development of flood control at Federal expense was started and, in accordance with the will of Congress and the approval of the President, this activity has become Nation-wide under the same governmental agency that began such work.*" (Chief of Engineers, Maj. Gen. Julian L. Schley, March 22, 1939, Congressional Record this date, Appendix, p. 4415.)

This entire brief, and all the testimony in the present litigation, deals with the flood control works constructed directly by the United States, under "the supervision of the Chief of Engineers" as authorized and directed by the Flood Control Act of May 15, 1928.

The effect of this Act was first before this Court in the case of *Hurley v. Kincaid*, 285 U. S. 95, 52 S. Ct. 267, 76 L. ed. 637.

1. The Boeuf Floodway is an *artificial* diversion deliberately and intentionally created by the Federal Government, the petitioner in this case. It is *designed* to flood respondent's property at times, and in a manner, and from a source, from which it was protected prior to the passage of the Flood Control Act of May 15, 1928. Loosely referring to the area as "a *natural* floodway" is not only beside the point, but entirely unfair, erroneous, misleading and confusing to the unwary.

The Jadwin Plan is the *deliberate design* of man. The human element of *choice* is reflected *passim* in the language of the Act and in the official description of the engineering plan. See *Hurley v. Kincaid*, 285 U. S. 95, 52 S. Ct. 267, 76 L. ed. 637.

The Flood Control Act of May 15, 1928, adopted, enacted into law, and authorized the construction of, a man-made engineering plan which "*fundamentally differs from the present project*" (Doc. 90, Sec. 3, R. 119). "The present project" referred to was the existing plan of undertaking to control floods in the Mississippi River by "*levees only*" (Doc. 90, Secs. 76 and 80, R. 122). This plan of all local property owners exercising their respective rights of self-defense by building levees for the protection of their own property regardless of the effect of those levees on other property owners was the plan considered by the Court in such cases as *Cubbins v. Mississippi River Commission*, 241 U. S. 351, 36 S. Ct. 671, 60 L. ed. 1041; *Jackson v. United States*, 230 U. S. 1, 33 S. Ct. 1011, 57 L. ed. 1363; *Hughes*

The fuse plug levee is to the Jadwin Plan what the vital valves are to the human heart. There can be neither life nor saving virtue in the Flood Control Plan of 1928 unless the fuse plug levee functions promptly and surely as intended.

Therefore the Flood Control Act of May 15, 1928, "established a *full degree of Federal Control over* the protection system, which prior to the 1928 Act had been exercised by local interests under the supervision of the Federal Government" (Neptune, R. 157). "*The local interests have no right to raise the fuse plug levee above the 1914 grade.* It cannot be done without destroying the effectiveness of the Jadwin Plan. One of the designated elements of the Jadwin Plan is to keep the fuse plug levee as such in order to preserve the elevations of the levee system above and below it" (Neptune, R. 277). "As to the claim that the local property owners could raise the fuse plug levee above the 1914 grade, from an engineering standpoint *the maintenance of the fuse plug levee at the 1914 grade and section is definitely and specifically an essential and vital feature of the plan* adopted by the Flood Control Act of May 15, 1928. *If this fuse plug should be raised by any authority, one of the essential vital features of the Jadwin Plan would be cancelled.* We would be back under the previous condition and history where, when river floods come down the river, the levee would break here one year and there another. All of the area now protected would be more or less under the same hazard" (Wonson, R. 281).

This fuse plug levee was completed to the then standard grade and section in 1921 by invitation of the United States, the present petitioner, and upon its assurance that if the local property owners would complete this line of levee by



closing the outlet or gap in the levee at the mouth of Cypress Creek, the property back of the levee would have complete protection against all future floods from the main channel of the Mississippi River (Simons, R. 173-174; Wonson, R. 171). Relying upon this assurance, the local property owners bonded their property to the extent of \$3,000,000 and completed this levee (R. 131-132, 151-152, 291-297), which held even during the unprecedented disastrous flood of 1927. This confident, assured, justified expectation on the part of property owners for speedy and ultimate protection against the flood waters of the Mississippi River equal to that enjoyed by other protected areas in the Middle Section of the alluvial valley of the river prevented former floodings of this property from seriously affecting market values. The District Court erred in refusing to adopt respondent's requested Finding of Fact No. 63 (a and b), (R. 315-316).

Now, the Flood Control Act of May 15, 1928, has changed all this. The petitioner, the United States, has taken over the control of this levee, respondent's only protection, and converted it into a "safety-valve" for the protection of the balance of the alluvial valley. Since May 15, 1928, and henceforth "**THE UNITED STATES MUST have CONTROL over the Cypress Creek levee and KEEP IT substantially at its present strength and present height**" (Doc. 90, Sec. 120, R. 124).

**THE LAW.** When it is demonstrated that the United States has taken over the complete control of the fuse plug levee, which is the only protection and defense afforded the respondent's property against the destructive flood waters from the main channel of the Mississippi River, a protection secured only by the respondent having joined other property owners in an investment of exceeding \$3.

times all the water that flows down the St. Lawrence River to the sea." "The Corps of Engineers, being no miracle workers, cannot find the means of taking 1,000,000 cubic feet of water out of the Mississippi River, five times the flow of the St. Lawrence River, and do it in any narrow fashion. We have to find the best means *and stay with it*" (Chief of Engineers General Markham, January 27, 1936, R. 145-146).

"Therefore, the only thing the United States is proposing is that instead of having a sporadic indefinable crevasse somewhere—and that is what we have always had in the past—we definitely put it down with prediction, and pay the flowage for that purpose, and pay nearly the real value of every foot that it traversed by that water in *that determined path*" (General Markham, January 27, 1936, R. 146, 147, 148).

In discussing the proposed Eudora Floodway before a Congressional Committee May 1, 1936, General Markham, then chief of engineers, accurately described the physical result of the fuse plug levee in the latitude of respondent's property in these words: "In this particular case we are taking these floodways and physically, *by the work of the United States*, directing these additional flood waters over particular property, and *that creates a Federal obligation*" (R. 149). "We are *physically, deliberately* putting additional flood waters down in a certain territory, and thus deliberately creating an obligation for the acquirement of those flowage rights" (R. 150).

The State of Arkansas, speaking through its constitutional voice, the General Assembly of the State, on April 13, 1934, declared that the United States had "*confiscated*"

property rights on the floor of the Boeuf Floodway (R. 152), and on March 6, 1935, made another legislative finding of fact that the petitioner in this case, the Government, "under its right of eminent domain *has taken* levees for the purpose of *diverting* waters over lands heretofore protected from flood waters," and "the taking of such lands and property has *destroyed values*" (R. 152-155). The State of Arkansas has consented to the exercise of these rights of eminent domain on the part of the United States in connection with its Flood Control Act "provided adequate provision shall have been made for the payment of just compensation to the party or parties entitled thereto" (R. 156).

"At the time the present suit was filed and since, additional destructive flood waters will pass over the (respondent) plaintiff's property by reason of diversion from the main channel of the Mississippi River, overtopping the fuse plug levee at gages somewhere around 59 feet on the Arkansas City gage as shown by our survey and profile of that low levee line." "If a flood crest in the Mississippi River exceeds the present height of the fuse plug levee at its weakest and lowest point the levee would be overtopped and would crevasse and would start to flood through the floodway and diversion. That would take place on this property and the head of the floodway with full crevasse effect. The release of a volume of water which has been held up against the levee some twenty feet deep on empty ground would result in destructive velocity with damage to the property in the head of the diversion section. Plaintiff's (respondent's) land is less than a mile from the fuse plug levee at the closest point. Her land is about 2½ miles from the fuse plug levee at Arkansas City." "When

## B. The LAW anent "Taking."

1. The ACT. We earnestly submit that the very clear and express language of the Act itself, standing alone and without reference to any other authority, is amply sufficient to fix legal liability in this case. Section 4 of the Act provides:

"Sec. 4. The United States *SHALL* provide flowage rights for additional destructive flood waters that *will* pass by reason of diversions from the main channel of the Mississippi River" (R. 119).

The Act makes no distinction, or differentiation of any kind whatever, between the four authorized and adopted diversions or floodways. The definite and express obligation is upon "*the United States*" to provide "flowage rights" in each.

One of the allegations of the Petition, and the unquestioned proof in the case, is that: "The waters that will flow into the Boeuf Floodway or diversion channel will ALL be diverted from the main channel of the Mississippi River at a place and in a manner which has never been true before" (R. 10).

The fuse plug levee of the Jadwin Plan, respondent's only protection from the flood waters of the main channel of the Mississippi River, held safely even during the unprecedented flood of 1927, and no "destructive flood waters" "*from the main channel of the Mississippi River*" passed over or through this section of the levee over respondent's property, or into the Boeuf Basin diversion, during the 1927 flood. Therefore, section 4 explicitly requires the petitioner United States to "provide flowage

rights" for *all* of the flood waters which the Flood Control Act of 1928 will now send over respondent's property. The language of the Act—"shall"—is mandatory.

There is no uncertainty whatever about the actual dedication of this floodway, or diversion channel, for public use in the protection of the balance of the alluvial valley of the Mississippi River (Doc. 90, Sec. 121, R. 124). The Congress expressly and carefully provides for all "additional destructive flood waters that *will pass* by reason of diversions" (Act Sec. 4, R. 119). As was suggested by Judge Martineau when overruling petitioner's demurrer below, it would be difficult for the Government to select language more clearly acknowledging liability. Appendix A.

The engineering plan (Doc. 90) treats the several floodways together, *the combination of them* producing the desired factor of safety. The Chief of Engineers states: "The water within the river channel does no damage whatever and it should be kept within the channel as long as possible. The excess *must* be spilled through *safety valves* when the volume exceeds the safe capacity of the river. *These safety valves* consist of one controlled spillway, several relief or fuse-plug levees at present levee grade and one levee of reduced height" (Doc. 90, Sec. 97, R. 123). There is no difference in principle between the legal rights of the property owners on the floor of each of these diversion channels below each of "these safety valves." The petitioner has admitted its liability to property owners in the other floodways. See *United States v. Hess*, (C.C.A. 8th) 70 Fed. (2d) 142; *United States v. Hess*, (C.C.A. 8th) 71 Fed. (2d) 78; *United States v. Yazoo & M. V. Ry. Co.*, 4 Fed. Supp. 366.



As late as February 27, 1934, the then head of the department having in actual charge the execution of the will of Congress, Chief of Engineers Maj. General Edward M. Markham, was assuring the Congress, and through Congress the American people including this respondent and the Federal Judiciary, that the United States did actually at that time have *full control of the fuse plug levee*, and would not hesitate to exercise that control. He then stated:

"The Boeuf Basin *has been put* in a very unfortunate situation since the levees below the Boeuf Basin were *designed* with the theory that *we will not permit beyond about 1,800,000 second-feet to pass the fuse plug*". (R. 141).

The same responsible Chief of Engineers was still later speaking *officially* for the petitioner United States on April 30, 1936, nearly two years after respondent's suit had been filed and while it was pending, when he said to Congress, with reference to Section 4 of the 1928 Act, and therefore necessarily urges upon this Court, the following:

"I think the confusion has to do with the words 'additional floodwaters.' In this particular case we are *taking* these floodwaters and *physically, by the work of the United States, directing these additional floodwaters over particular property, and that creates a Federal obligation.*" (R. 149.)

As a matter of current history, the Court may well take judicial notice of the fact that the petitioner United States, during the recent flood of 1937, *actually exercised* its right of complete control over these fuse plug or relief levees taken over by the Flood Control Act of May 15, 1928, by actually dynamiting the similar fuse plug levee at the head of the Birds Point-New Madrid Floodway (R. 264), as

well as by actually using the Bonnet Carre Floodway above New Orleans. Furthermore, the public press reports from Washington during the 1937 flood repeated General Markham's public assurances that *the fuse plug levee at the head of the Boeuf Floodway would be breached if necessary.*

This Court will not doubt for one moment that whenever it is necessary the Government will exercise its right to insure the use of the Boeuf Floodway as contemplated by the Flood Control Act of May 15, 1928, for the protection of the remainder of the alluvial valley of the Mississippi River. (Doc. 90, Sec. 121, R. 124).

On March 30, 1938, long after the trial in the District Court (R. 117), the Chief of Engineers still emphatically asserted to Congress the right and purpose of the Government to blow out the fuse-plug levee whenever deemed necessary for the protection of the other government levees. "It was left at its lower height *for that very purpose.*" "That was the original purpose as far back as the report of 1928, the Jadwin report." "That still remains with its original function." Genl. Schley, HEARINGS, House Committee on Flood Control, March 30 to April 19, 1938, at page 20.

The Committee reported to Congress that it was essential that the "*United States should have exclusive control to render flood-control system effective?*" (House Report No. 1072, 70th Congress, 1st Session, p. 30).

Since the passage of the Flood Control Act of May 15, 1928, the petitioner's legal right of control over the fuse plug levee at the head of the Boeuf Floodway has been, and is, *exclusive and complete.*

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## POINT V.

The physical facts accomplish a "TAKING" of respondent's private "*property*" for public use.

The District Court erred in its Conclusions of Law Nos. 1, 2 and 3, R. 368.

**A. The FACTS.** A study of the preceding Points leads irresistibly to the conclusion that respondent's private property has, in fact and in law, been taken for a public use by the petitioner within the meaning of the Fifth Amendment to the Constitution requiring payment of just compensation therefor to respondent.

In summary, the following unequivocal evidence in the record correctly reflects the actual physical facts.

"The physical facts that can be verified by any intelligent engineer are these: It is perfectly manifest that something like a million cubic feet of water will have to be handled in that valley" (Boeuf Floodway). "Over a million feet has to go out of there whether anybody likes it or not." "The Boeuf Basin has been put in a very unfortunate situation since the levees below the Boeuf Basin were designed with the theory that we will not permit beyond around about 1,800,000 second-feet to pass the fuse plug."

"The conception of the law or of Congress that we are working to is that there should remain in the system a *fuse plug* at Boeuf \* \* \*, and then that water will be taken out of the main stem to the West, as it stands."

"I can consent to nothing that increases substantially the flow of water below the fuse plug beyond 1,850,000 second-feet, because it courts disaster." "*We do not dare to*

*permit this water to pass that fuse plug*" (Chief of Engineers General Markham, February 27, 1934, Tr. 140-141).

"The Federal Land Bank of St. Louis will not make Land Bank loans in the Boeuf Basin Floodway \* \* \* because the Boeuf Basin floodway project is hanging over their heads and that affects loans seriously, affects their land values so that if we acquired land there we think we would find it very difficult to sell. People are afraid to go in there because they do not know what is going to happen" (Engineer Appraiser Kelly, February 27, 1934, Tr. 141).

"The capacity of the main leveed channel of the Mississippi River between the mouth of the Arkansas and the entrance to the Eudora Floodway is not sufficient at present to prevent a break in the levees between the Arkansas River and Eudora, nor is it possible at present to predict accurately where such a break would occur in a great flood, although experiments indicate that it would probably be *on the west side above Arkansas City*" (Mississippi River Commission, February 12, 1935, Doc. 1, p. 23, Sec. 22, R. 144).

"As to the contention of those who think that the lower valley can be protected within the levees of the main stream, I would state our conclusion that in order to take care of flood waters *there must be taken out of the river a million cubic feet a second.*" "If there is any other answer having to do with protection of the lower valley, we do not know it. We cannot uncover it, and we cannot discover it." "I repeat that a million second-feet must be taken out of that river unless you are going to have more and more disasters." "That is pretty nearly six times all the water that flows over Niagara Falls. It is pretty nearly five

the fuse plug levee is overtopped the water in the river will stand 20 feet above the elevation of plaintiff's land less than a mile away" (Neptune, R. 160-161, 157-158). "Plaintiff's property has never been overflowed before by waters diverted from the main channel of the Mississippi River at the point where the fuse plug levee will now breach" (Neptune, R. 163).

The physical facts constituting the taking of respondent's property as alleged in her complaint are furthermore fully supported by Mr. Wonson (R. 167, 168, 171, and 173); and by Mr. Simons (R. 175, 176, 177 and 178); and by all of respondent's witnesses proving her damages (Hopson, R. 183, Baxter R. 191, Thompson R. 195, Parker R. 196, Clayton R. 200, Zellner R. 201, Neal R. 202, Courtney R. 204, T. A. Prewitt R. 204, Mann R. 205, B. C. Prewitt R. 207, Matthews R. 208, and Zebold R. 209).

These *physical facts* are not disputed by any witness. Only immaterial theoretical opinions and speculative prophecies are debated.

The petitioner's own chief expert witness Mathes testified: "Immediately following the passage of the Flood Control Act of 1928, work was begun on the Jadwin Plan as one, unified, comprehensive project for the flood control of the alluvial valley of the Mississippi River, funds being available at the time; and the work has proceeded practically without cessation since that time" (R. 244). "The construction work done by the United States Government under the Flood Control Act of May 15, 1928, now prevents the Mississippi River from using that large natural flood plane area east of the river in the State of Mississippi" (R. 251). "If the fuse plug levee is left as it is, a potential



*floodway is still there with a possibility of its use every season under the present plan.*” “The Flood Control Act of June 15, 1936, the Overton Act, authorizing the Markham Plan, leaves this fuse plug levee along the main channel of the river at the 1914 grade just as it is under the Jadwin Plan of the 1928 Act. It is not to be raised. . . .

When the water reaches a stage of 60.5, the fuse plug levee is intended to be overtopped and to crevasse under either plan. *The plaintiff's land is in the floodway under either plan, and it doesn't make any difference which is used, and would be by the same fuse plug levee*” (R. 246). “The Jadwin Plan as adopted by the Flood Control Act of 1928 has not yet been actually, physically changed. . . . The only plan under actual construction is that authorized by the Flood Control Act of May 15, 1928. *That is the actual, physical plan which is on the ground*” (R. 247). “Plaintiff's property is now in one of these particular floodways, at the most critical point of the River just below the mouth of the Arkansas. . . . The plaintiff's property has been on the floor of that floodway, very near its head, since the passage of the Flood Control Act of May 15, 1928” (Mathes R. 250).

“The plaintiff's property has been definitely subjected to a different flood hazard from that to which it was subjected at any time prior to the construction work done by the United States pursuant to the provisions of the Flood Control Act of May 15, 1928” (Neptune, R. 159).

“The construction work done by the United States pursuant to the provisions of the Flood Control Act of May 15, 1928, has created a different degree of flood hazard or menace to plaintiff's property in that previously her property had more or less of an even break with all the other prop-

erty in the alluvial valley. Crevasses along the river might be at various places. Under the present plan and law, the location of the levee failure in the middle section of the river has been *predetermined at the fuse plug* whenever the floods are sufficient to cause the fuse plug to operate" (Wonson, R. 168). "The effect of construction work done under the Flood Control Act of May 15, 1928, has subjected plaintiff's property to a *different and increased* flood hazard; to more depth of water and a greater velocity of flow on account of the close proximity of this property to the fuse plug levee" (Simons, R. 177).

These physical facts cannot be truthfully controverted. They make a constitutional "taking" of respondent's property, requiring ultimate judgment for respondent in this action.

*The Project Flood.* Considerable confusion exists as to the meaning of the phrase "the project flood" designed to be successfully controlled by the Jadwin Plan. It is variously described as follows: "The maximum flood predicted as possible" (Doc. 90, Sec. 2); five feet higher at Arkansas City on the fuse plug levee than the 1927 flood would have reached on the gage had it been confined (Doc. 90, Sec. 117, R. 123); "the greatest predicted possible excess water over and above the capacity of the leveed river below" (Doc. 90, Sec. 118, R. 124); "allowing for the escape of waters in the *greatest floods* out of the main river through a designated floodway" (Doc. 1, Sec. 8, R. 142); "a stage of about 74½ feet at Arkansas City" (14 feet above the present fuse plug levee) (Doc. 1, p. 18, R. 143); "400,000 more second-feet than went down the river in 1927" (General Markham, R. 150); "the maximum probable flood" (Doc. 1, p. 18, Sec. 7, R. 143); "the greatest

flood predicted as possible" and "all water predicted as possible" (Doc. 90, Sec. 99, R. 123),—which could very well exceed 4,399,000 cubic second-feet at the fuse plug levee (Neptune, R. 162).

"The 1928 Act contemplates a flood 25% to 30% in excess of the estimated 1927 flood, called the project flood, which would necessitate the escape of *more* than 1,000,000 cubic second-feet of water through the fuse plug levee down the Bœuf Floodway" (Neptune, R. 161-162; Wonson, R. 170). "The project flood' contemplated by the Flood Control Act of May 15, 1928, is not the greatest possible maximum flood that can come down the river, and does not purport to be" (Wonson, R. 171).

The 1927 flood at the fuse plug levee is estimated as having been a volume of only 2,460,000 cubic second-feet (Clemens, R. 261). The 1937 flood was not more than two-thirds of the estimated project flood (R. 164). It came almost entirely out of the Ohio River, while the upper Mississippi River and the Arkansas and White Rivers contributed substantially nothing to the flood (Carter, R. 284; Clemens, R. 263; Neptune, R. 276).

*Former Estimates.* These estimates of the engineers in the past have been consistently erroneous by *under estimation*. Recent floods are repeatedly exceeding all former estimates (Doc. 90, Sec. 96, R. 122; Doc. 798, p. 2, R. 137; Doc. 798, p. 47, R. 139; General Markham, May 1, 1936, R. 150).

2. *There can be no possible doubt that the CONGRESS did in fact contemplate and INTEND LIABILITY.*

Senator Jones, Chairman of the Senate Commerce Committee which conducted the Hearings, immediately before the passage of the bill by the Senate unanimously, said: "We have provision in the bill for condemnation of right-of-way, *flowage rights* and so on. *We feel that under the constitutional provision no private property can be taken for public use without compensation.* We could not avoid that if we desired to do so. \* \* \* If we sought to pass legislation authorizing the taking of private property without compensation, the courts would not uphold such a provision" (69 Cong. Rec., Part 5, p. 5485).

Congressman Reid, Chairman of the House Flood Control Committee in charge of the bill in the House, in explaining the bill in its present form, speaking on the "conference report," immediately before the conference report was agreed to, declared: "*This is the first time that any right has ever been recognized on the part of the individual owner against the Government for any flood control damages.* I think it (section 4 of the Flood Control Act) *creates a right*, and I presume every right in court follows the creation of that right" (69 Cong. Rec., Part 8, p. 8123).

A careful reading of all of the debates in Congress during the passage of this Flood Control Act will disclose that *not a single member of the Congress took the position that the owners of property constituting the floor of the designated floodways were not entitled to compensation for their sacrifice.* It was conceded by all that someone had to pay for the Government's right to flood or overflow property in these artificially created diversion channels. See Appendix B.

The Congress advisedly, deliberately, intentionally and expressly accepted NATIONAL RESPONSIBILITY, exercising EXCLUSIVE NATIONAL CONTROL, assuming complete GOVERNMENT LIABILITY, thus by legislation reversing the rule of former judicial decisions, rendering prior judicial precedents inapposite, nugatory and obsolete.

Republican Party Platform, 69 Cong. Rec., Part 2, p. 1730; also 69 Cong. Rec., Part 3, p. 3465; Democratic Party Platform, 69 Cong. Rec., Part 2, p. 1730; also 69 Cong. Rec., Part 3, p. 3465; President CALVIN COOLIDGE to Congress, 69 Cong. Rec., Part 7, p. 7126, House Report No. 1072, 70th Cong., 1st Session, p. 1; Senator RANDELL, (La.) 69 Cong. Rec., Part 1, pp. 938-939; Senator HAWES, (Mo.) 69 Cong. Rec., Part 4, pp. 4395-4396; Congressman REID, (Ill.) (Chairman House Flood Control Committee), 69 Cong. Rec., Part 5, p. 5645; Senator CARAWAY, (Ark.) 69 Cong. Rec., Part 4, p. 3915; Congressman SWING, (Calif.) 69 Cong. Rec., Part 6, p. 6717; Congressman MARTIN, (La.) 69 Cong. Rec., Part 6, pp. 6724, 6726; Congressman O'CONNOR, (N. Y.) 69 Cong. Rec., Part 6, p. 6782; Congressman BLACK, (N. Y.) 69 Cong. Rec., Part 7, p. 7111; Senator REED, (Mo.) 69 Cong. Rec., Part 5, pp. 5294, 5295, 5296; Congressman SWANK, (Okla.) 69 Cong. Rec., Part 7, p. 7119; Senator SACKETT, (Ky.) 69 Cong. Rec., Part 1, p. 773; Congressman HULL, (Ill.) 69 Cong. Rec., Part 2, pp. 2261-2263; Congressman COLLIER, (Miss.) 69 Cong. Rec., Part 2, p. 1731; Congressman QUIN, (Miss.) 69 Cong. Rec., Part 6, p. 6709; Congressman KOPP, (Iowa) 69 Cong. Rec., Part 6, pp. 6709-6710; Congressman NELSON, (Mo.) 69 Cong. Rec., Part 6, p. 6669; Congressman JOHNSON, (Texas) 69 Cong. Rec., Part 5, p. 5334; Congressman REID, (Ill.) 69 Cong. Rec., Part 5, pp. 5608,



So agreed they ALL. Congressman WILSON, (La.) 69 Cong. Rec., Part 8, pp. 8210, 8211; Congressman O'CONNOR, (La.) 69 Cong. Rec., Part 1, p. 765; Congressman SWANK, (Okla.) 69 Cong. Rec., Part 7, p. 7119; Congressman HULL, (Ill.) 69 Cong. Rec., Part 2, p. 2263, and 69 Cong. Rec., Part 6, p. 6718; Congressman FREAR, (Wis.) 69 Cong. Rec., Part 8, p. 8120 and 69 Cong. Rec., Part 6, p. 6779, and 69 Cong. Rec., Part 7, p. 7000; Congressman LaGUARDIA, (N. Y.) 69 Cong. Rec., Part 7, p. 7002; Congressman REID, (Ill.) 69 Cong. Rec., Part 5, pp. 5613 and 5649, Cong. Rec., Part 6, p. 6791, 6792 and 6795, and 69 Cong. Rec., Part 7, p. 7106 and p. 7111; Congressman MORROW, (N. Mex.) 69 Cong. Rec., Part 5, p. 5321; Congressman SWING, (Calif.) 69 Cong. Rec., Part 6, p. 6717; Congressman OOX, (Ga.) 69 Cong. Rec., Part 7, p. 7021; Congressman BLACK, (N. Y.) 69 Cong. Rec., Part 7, p. 7111; Congressman O'CONNOR, (N. Y.) 69 Cong. Rec., Part 6, p. 6782; Congressman DRIVER, (Ark.) 69 Cong. Rec., Part 6, p. 6783, and p. 6786; Congressman KOPP, (Iowa) 69 Cong. Rec., Part 6, p. 6712; Congressman MADDEN, (Ill.) 69 Cong. Rec., Part 7, p. 7003 and p. 7096; Congressman DEMPSEY, (Ill.) 69 Cong. Rec., Part 7, p. 7108; Congressman WHITTINGTON, (Miss.) 69 Cong. Rec., Part 4, p. 4139, and 69 Cong. Rec., Part 6, p. 6652; Governor JOHN E. MARTINEAU, late United States District Judge in Arkansas, HEARINGS, House Committee on Flood Control, January 5-17, 1928, Part 4, p. 2500; and Congressman JACOBSTEIN, (N. Y.) 69 Cong. Rec., Part 8, p. 8584.

Congressman DRIVER, (Ark.) speaking as an active member of the Flood Control Committee, said:

"In the language of the law the duty of the United States is to 'provide flowage rights for additional destructive flood waters that will pass by reason of diversions from the main channel of the Mississippi River.' This particular language is employed to differentiate the natural reservoirs and streams which are now charged with the burden of *natural drainage—that is, such rivers, bayous, and depressions through which usually pass the waters falling and are drained through the same*, as distinguished from the areas which will be charged with waters not accustomed to flow over the land through natural drainage." 69 Cong. Rec., Part 10, p. 10793.

During the passage of the act, an effort was made to limit the recovery of property owners in the floodway strictly to the constitutional limitation, and Congressman TILSON; (Conn.) offered the following amendment as a substitute for the language in section 4 as we now find it, to-wit:

"Any property taken by the United States for the purpose of carrying out the terms of this act for which compensation is required by the Constitution of the United States shall be paid for by the United States." 69 Cong. Rec., Part 7, p. 7104.

In urging the adoption of this amendment, Congressman TILSON stated:

"We come now to the question—and it is the crux of the whole question—who shall furnish the land for these floodways. . . ."

"Why should we not stand on the constitutional right which every citizen has to receive just compensation if his property is taken for a public use? In the amendment that

I have offered it is stated, in effect, that in case private property is taken in the constitutional sense, *the United States assumes the responsibility for it*. How can anyone suffer if his constitutional rights are preserved and these are buttressed by an assumption of the obligation by the United States in case his property is taken within the meaning of the Constitution? \* \* \*

"The amendment that I have offered gives everyone ample protection, as he is protected under the Constitution, and fixes the obligation of the United States for such damage as may accrue under the Constitution. Why should we not be satisfied with this? Why is it not enough to protect any citizen of the United States? I think it is, and that when we go beyond this and propose to buy lands, easements, or flowage rights in advance we enter upon dangerous ground." 69 Cong. Rec., Part 7, p. 7105.

But the Congress promptly and overwhelmingly rejected this amendment (69 Cong. Rec., Part 7, p. 7111); Chairman REID, speaking for the majority as follows:

"Mr. Chairman, I told you the first day that we agreed to everything that the President's representatives said they wanted *except turning destructive flood waters down upon innocent people*, and I stand today reiterating that same proposition. The only relief provided by the amendment that the gentleman from Connecticut (Mr. TILSON) proposes would give to a man after his property has been destroyed by the destructive flood, or probably some of his kin have been drowned, would be to say to him, 'You go to the United States courts, start a lawsuit, and at the end of 5 or 10 years, perhaps, you will be thrown out, and then you will be able to come to Congress and be sent to the Court of Claims, and after fussing around there for a year or two

you will be forgotten,' If that is the kind of Government we have, then we better have a change in the form If not in the administration of it. You do not know what you do when you try to turn this water on the people and leave them to their constitutional rights. *At the present time these are not natural floodways.*" 69 Cong. Rec., Part 7, pp. 7105, 7106.

"*So the amendment was rejected.*" 69 Cong. Rec., Part 7, pp. 7111-7112.

"The Jadwin plan provided that floodways or diversions like the *Boeuf floodway* of more than 1,000,000 acres shall be furnished to the Federal Government by the State. *The committee bill requires that the Federal Government shall purchase, or secure by condemnation this floodway* . . . . Congressman FREAR, in presenting to the House the committee minority report, 69 Cong. Rec., Part 6, p. 5879.

In replying to Congressman FREAR, Chairman REID, speaking for the majority, said:

"We have met the representatives of the President, and we have agreed on everything they asked, and I am going to present amendments embodying everything the President asked, with the single exception of agreeing to one thing—and *I will never propose an amendment or support any section of this bill which will permit the turning down on innocent people in these so-called floodways of a torrent three times that of Niagara Falls without first acquiring the rights-of-way or the flowage rights; and there I stand, and that is the only difference between us today.*

"The last speaker is in error. *The Boeuf floodway at the present time is not a floodway.* . . . These lands are

protected, the same as the lands on the Mississippi River, by the levees on the Mississippi River; and unless the Mississippi levees break, you will have no floods in the Boeuf floodway; \* \* \* but they are trying to give you the impression that we are trying to make the Government acquire land that is now a floodway. *This is not true, and no one claims it is true.* \* \* \*

"Mr. LaGUARDIA. What does the gentleman substitute for section 4?

"Mr. REID of Illinois. *That the Government shall be liable where it diverts the water from the main channel.*" 69 Cong. Rec., Part 7, pp. 7000-7001.

"\* \* \* the provisions in section 4 of the bill were written, I dare say, for the purpose \* \* \* of taking the property out of the class that is mentioned in the cases of Jackson and Hume (Hughes) and others, where the property in question was clearly and admittedly destroyed under circumstances where the owner had no right of relief." Congressman COX, (Ga.) 69 Cong. Rec., Part 6, p. 6720.

"I believe it is generally admitted by all that where property is taken to be used as a floodway compensation should be made for whatever interest in that property may necessarily be dedicated to that purpose." Congressman WILSON, (La.) 69 Cong. Rec., Part 6, p. 6776.

"Mr. Speaker, the conference report on S. 3740, commonly known as the Jones-Reid flood control bill, is pending before the Senate and the House. \* \* \* *The bill contemplates that the Government will provide the flowage rights through floodways, diversions and spillways, and the rights-of-way for levees along the diversions.* \* \* \*



*"The compensation for any property taken is determined in the courts of the United States. Commissioners to determine values are appointed only by the Federal court. . . .*

*"The President recommended a local contribution of 20 per cent. . . . The President, however, made it known to Congress that he had receded from this position. He is willing to eliminate the local contribution of 20 per cent. . . .*

*"Mr. Madden stated, substantially, that the President desired the United States to furnish the floor, to use his language, for diversions.*

*" . . . the Government is to provide flowage rights . . . for the diversion at Cypress Creek through the Boeuf Basin, hereinafter called the Boeuf diversion; . . . The administration was represented as being favorable to being responsible for the flowage rights. The Jadwin plan is accordingly modified in the bill to add the estimated costs of the flowage rights through the spillways, floodways, and diversions mentioned, and to provide that the United States shall furnish the rights-of-way for levees along the diversions. . . . Their cost should be a common charge against the Government. Mr. Madden, manifesting a fine spirit of fairness and justice in treating this great national problem, conceded that the Government should be responsible for the flowage rights." . . .*

*"Boeuf Diversion. . . . The Jadwin plan did not contemplate that the United States should provide the flowage rights. . . . The Government should pay for these flowage rights. The United States permitted and consented to the construction of a levee across the mouth of Cypress Creek. There was a natural outlet, and the Gov-*

5616; Congressman RAGON, (Ark.) 69 Cong. Rec., Part 5, p. 5125; Congressman LOZIER, (Mo.) 69 Cong. Rec., Part 5, p. 5464; Congressman DAVENPORT, (N. Y.) 69 Cong. Rec., Part 6, p. 6715; Congressman DRIVER, (Ark.) 69 Cong. Rec., Part 6, p. 6787; Congressman GUYER, (Kan.) 69 Cong. Rec., Part 6, p. 6774; Congressman SINCLAIR, (N. Dak.) 69 Cong. Rec., Part 6, p. 6775; Congressman (Chairman) REID, (Ill.) 69 Cong. Rec., Part 6, p. 6796; Congressman PRALL, (N. Y.) 69 Cong. Rec., Part 6, p. 6729; Congressman SPEARING, (La.) 69 Cong. Rec., Part 7, pp. 7027-7028; Congressman GREEN, (Fla.) 69 Cong. Rec., Part 7, p. 7121; Congressman LOWREY, (La.) 69 Cong. Rec., Part 7, p. 7125; Congressman HERSEY, 69 Cong. Rec., Part 7, p. 7126; Congressman CARTWRIGHT, (Okla.) 69 Cong. Rec., Part 7, p. 7127; Congressman REED, (Ark.) 69 Cong. Rec., Part 7, p. 7130; Senator ASHURST, (Ariz.) 69 Cong. Rec., Part 5, p. 5481; Senator JONES, (Wash.) 69 Cong. Rec., Part 5, p. 5483; Senator RANDELL, (La.) 69 Cong. Rec., Part 5, p. 5492; Senator STEPHENS, (Miss.) 69 Cong. Rec., Part 5, p. 5493; Senator HEFLIN, (Ala.) 69 Cong. Rec., Part 5, p. 5493; Senator MAYFIELD, 69 Cong. Rec., Part 5, p. 5294; Senator SIMMONS, (N. C.) 69 Cong. Rec., Part 5, p. 5297; Congressman FREAR, (Wis.) 69 Cong. Rec., Part 6, pp. 5869, 6655; Congressman COCHRAN, (Mo.) 69 Cong. Rec., Part 6, p. 5998; Congressman ASWELL, (La.) 69 Cong. Rec., Part 6, p. 6111; Congressman HOWARD, (Okla.) 69 Cong. Rec., Part 6, p. 6311; Congressman WILSON, (La.) 69 Cong. Rec., Part 6, p. 6644; Congressman WHITTINGTON, (Miss.) 69 Cong. Rec., Part 6, pp. 6649-6650; Congressman WHITTINGTON, (Miss.) 69 Cong. Rec., Part 4, pp. 4134, 4141, 4138; Congressman FULLBRIGHT, (Mo.)

69 Cong. Rec., Part 3, pp. 3400-3401; Congressman HASTINGS, (Okla.) 69 Cong. Rec., Part 7, p. 7012; Senator McKELLAR, (Tenn.) 69 Cong. Rec., Part 5, p. 5495. See Appendix B.

LAW. "*The intention of the lawmaker is the law.*"

*Hawaii v. Mankichi*, 190 U. S. 197, 212, 23 S. Ct. 787, 47 L. ed. 1016, at p. 1021.

"A thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter. *People v. Utica Ins. Co.*, 15 Johns., N. Y., 358, 381, 8 Am. Dec. 243; *Territory of Hawaii v. Mankichi*, 190 U. S. 197, 212, 23 S. Ct. 787, 47 L. ed. 1016; *Barrett v. Van Telt*, 268 U. S. 85, 90, 91, 45 S. Ct. 437, 69 L. ed. 857."

*Thompson v. Terminal Shares*, decided May 18, 1939, (C.C.A. 8th), 104 F. 2d (Advance Sheets) I, at p. 8.

That the Congress, and the Congress alone, is authorized to speak for the United States, and shape its policies, is beyond question. When Congress deliberately assumes contractual liability on behalf of the Government no Court has the moral right to deny that liability.

Congress intended by the language of section 4 of the Flood Control Act to require payment by the United States of compensation for the servitude taken, viz., the "flowage rights." For this *right* to artificially overflow or flood their property—regardless of when, or how often used, if ever—the Government purposed, and expressly provided, that the property owners in the floodway should be paid. Congress desired to avoid any possible controversy as to whether or not such owners of property would be adequately protected by the provisions of the Fifth Amendment of the Constitution. Congress intended that "just compensation" for the "property" "taken" should be liberally

construed to cover all *damages* sustained by the property owners; notwithstanding, under former judicial decisions, the United States might not have been liable for such *damages*.

No informed mind can possibly doubt these facts after reading the congressional discussion preceding the passage of the Act. See Appendix B.

Judge Martineau, in overruling petitioner's demurrer in the instant case in the District Court, declared:

*"I have no doubt in my mind that, under the Flood Control Act whatever damage can be established, can be recovered in a proper suit against the Government. The fact, that the plan itself contemplated that these lands should be used as a flowage way is sufficient to show that the damage comes from their actual taking for public use, . . . I am sure that was the intention, and the opinion held by almost everybody in the Congress which passed the bill. Nobody wants to take private property and use it for flood control purposes without the proper compensation being made. . . . everything in the bill is intended to protect those who were damaged . . . If that is not accomplished by the wording of the bill it is because those who were interested in its passage were mistaken as to the meaning of the language placed in it. I am sure that was the meaning intended at the time of its passage."* See Appendix A.

So agreed every member of the Congress who spoke on the Bill.

In its very complete report on "Flood Control in the Mississippi Valley" (House Report No. 1072, 70th Con-



gress) the Committee on Flood Control reported its findings, and deliberate judgment, to the Congress as follows:

"Thirty States pour their flood waters down on Louisiana, and yet, after having erected levees sufficient to take care of the natural flood waters, it is forced to contribute large sums to take care of the floods produced by artificial drainage caused by the prosperity of other States. *The one causing the damage should pay.* It is our boast that there is no wrong without a remedy. *This is a vain boast unless the Federal Government does its whole duty to the people of the lower Mississippi Valley.* Fair play and common justice would require that, . . ." (House Report No. 1072, p. 15).

Senator HAWES, (Mo.) stated to the Congress:

"The President recognized this great change in policy and has opposed it; but I understand that now *he has finally agreed that the people of the United States shall pay practically all the cost of this work, including sixty or seventy millions to landholders for lands and rights.* In short, the President has surrendered." 69 Cong. Rec., Part 8, p. 8192.

On the same day, Senator CARAWAY, (Ark.) had just stated to the Senate:

"The only measure of recovery that one who owns property there that is taken, or partly taken, for public use, is the difference between the value of the property before and after the improvement is made. *You can not take that right from the owner, because the Constitution guarantees it to him,* and the word 'additional' does not add to or take from the liability of the Government, or the right of the citizen whose property is appropriated." 69 Cong. Rec., Part 8, p. 8190.



ernment closed it. At the time, Cypress Creek was closed it was thought that levees only would provide complete flood control. *The local interests relied upon the judgment of the commission.* They have spent millions of dollars in construction works and in draining and improving lands in the Boeuf area. . . .

"The conference committee has materially amended the section as it passed the Senate and as it passed the House. The Government is only liable for flowage rights. The provision only includes a declaration that *the United States will furnish the flowage rights.* If the United States is to furnish the floor for the diversions, then the conference committee has met the views of the President. *Flowage rights mean nothing more nor less than the floor for the diversions.* . . .

"The Government will respond in damages if the flowage rights are not acquired over railways and highways. The view of the administration has been met in this regard." Congressman WHITTINGTON, (Miss.) 69 Cong. Rec., Part 7, pp. 7886, 7887, 7888, 7889.

"In this comprehensive plan you have certain floodways and spillways definitely mapped out. Now, any property in that spillway or floodway path would be entitled to just compensation under the Tilton amendment and under existing law. . . . So that the difficulty suggested by the gentleman from Illinois (Mr. REID) as to leaving these people with an indefinite remedy and undecided as to what tribunal they should resort to is fully decided in the case of the *Great Falls Manufacturing Co.*, reported in One Hundred and twelfth United States. (U. S. v. *Great Falls Mfg. Co.*, 112 U. S. 645, 55 S. Ct. 306; 28 L. ed. 846.) *They can*

*treat it as a contract, and go directly to the Court of Claims if they so desire. . . .*

" . . . In the case cited by the gentleman from Illinois, (as *Cubbins v. Mississippi River Commission*, 241 U. S. 351, 36 S. Ct. 671, 60 L. ed. 1041; *Jackson v. U. S.*, 230 U. S. 1, 33 S. Ct. 1011, 57 L. ed. 1363; *Hughes v. U. S.*, 230 U. S. 24, 33 S. Ct. 1019, 57 L. ed. 1374; *Bedford v. U. S.*, 192 U. S. 217, 48 L. ed. 414), I repeat that the damage was *incidental and unexpected*. It was not within the contemplation of the project itself, and I say for the third or fourth time that in the case of *the bill we are now considering you have a certain definite and specific proposition mapped out in a comprehensive flood relief plan, and that comes clearly within all of the decisions I have cited*." Congressman LA-GUARDIA, (N. Y.) 69 Cong. Rec., Part 7, pp. 7109-7110.

These "oracles indubitably clear and infallibly certain" proclaim to the world that if respondent is denied recovery in her present suit the will of the Congress of the United States will be violently thwarted. We are confident this Court will not knowingly contravene these solemn official assurances of the Government—the law of the land. "The intention of the lawmaker is the law." *Hawaii v. Mankichi, supra*.

Re: "ANCIENT FLOODWAY." As its theme song in this case, petitioner constantly harps in monotonous monotone on its dreary, iconoclastic *theory* that all the Boeuf Floodway, including respondent's property, was once the ancient flood-bed of the river, and anyone foolish enough to live in the high-water bed of the Mississippi River *ought* to be drowned. It had the district court erroneously find: "The proof shows that the Boeuf Basin has always been a floodway" (No. 19, R. 356; Error No. 210, R. 140).

Congress also considered, discussed and *rejected* this *theory* so inconsistent with the actual facts. "It is merely an ignorant assumption unsupported by facts." Senator HAWES, 69 Cong. Rec., Part 4, p. 4396; Chairman REID, (Ill.) 69 Cong. Rec., Part 6, pp. 6790-6792 and 69 Cong. Rec., Part 5, p. 5616; Senator RANSDELL, (La.) 69 Cong. Rec., Part 1, p. 938 and 69 Cong. Rec., Part 1, p. 774; Congressman COLLIER, (Miss.) 69 Cong. Rec., Part 2, p. 1729; Senator CARAWAY, (Ark.) 69 Cong. Rec., Part 8, pp. 8190-8191; Congressman WHITTINGTON, (Miss.) 69 Cong. Rec., Part 6, p. 6652. Some faint idea of the industrial development of this vast fertile area may be gathered from examination of the enormous losses sustained which gave the Congress such national concern. See 69 Cong. Rec., Part 4, p. 4397 and 69 Cong. Rec., Part 7, p. 7131, especially indicating the development and civilization of Desha County, Arkansas.

The most conclusive refutation of this unfair, prejudicial, specious argument that respondent's property must be regarded as lying in the natural high-water bed of the river and therefore subject to the Government's use at pleasure without liability, is found in the decision of this Supreme Court of the United States to the contrary. See *Cubbins v. Mississippi River Commission*, 241 U. S. 351, 36 S. Ct. 671, 60 L. ed. 1041, at p. 1049, quoted by Congressman Cox as follows:

• "Indeed; from the face of the bill, it is apparent that the rights relied upon were assumed to exist upon the *theory* that the valley through which the river travels, in all its length and vast expanse, with its great population, its farms, its villages, its towns, its cities, its schools, its

colleges, its universities, its manufactories, its network of railroads, some of them transcontinental, are virtually to be considered from a legal point of view as constituting *merely the high-water bed of the river*, and therefore, subject, without any power to protect, to be submitted to the destruction resulting from the overflow by the river of its natural banks. • • •

“In fact, the nature of the assumption upon which the argument rests is shown by the contention that the building of the levees under the circumstances disclosed was a work not of preservation but of *reclamation*—that is, a work not to keep the water within the bed of the river for the purpose of preventing destruction to the valley lying beyond its bed and banks, but to *reclaim* all the vast area of the valley from the peril to which it was subjected by being situated in *the high-water bed of the river*. If it were necessary to say anything more to demonstrate the *unsoundness of this view*, it would suffice to point out that the *assumption is wholly irreconcilable with the settlement and development of the valley of the river*; that it is at war with the action of all the State Governments having authority over the territory, and is a complete denial of the legislative reasons which necessarily were involved in the action of Congress creating the Mississippi River Commission and appropriating millions of dollars to improve the river by building levees along the banks in order to confine the waters of the river *within its natural banks*, and by increasing the volume of water to improve the navigable capacity of the river.’”

(*Cubbins v. Mississippi River Commission*, 241 U. S. 351, 36 S. Ct. 671, 60 L. ed. 1041, at p. 1047.) Congressman COX, (Ga.) 69 Cong. Rec., Part 6, p. 6720.



Arkansas City, the county seat of Desha County, lying immediately in front of respondent's property, is one of the oldest river settlements in the State. It was a thriving business community when Mark Twain wrote his "Life on the Mississippi River." Churches, school houses, courts of justice, railroads, banks, sawmills, gins, telephone and telegraph lines, and business houses for commerce of every kind and character, and all the other material indicia of the blessings of modern civilization (R. 183, *et seq.*), such as have existed in and around Arkansas City for generations, are not found in the unreclaimed flood-beds of rivers. If respondent's property and Arkansas City were ever the ancient and natural flood-bed of the Mississippi River that was ancient history when the Flood Control Act of May 15, 1928, was passed. The Congress was correctly advised by Chairman Reid that: "*The Boeuf floodway at the present time is not a floodway*" (69 Cong. Rec., P. 7, at p. 7000). See also Appendix B, III. Cultivated land like respondent's, in that vicinity, was enjoying a market value of from \$100 to \$125 per acre immediately before the legal creation of Boeuf Floodway (R. 185). No witness disputed that actual fact.

"The bank of the river was where it was found, and did not extend over a vast and imaginary area." *Cubbins v. Mississippi River Commission, supra*, 60 L. ed., at p. 1049.

Therefore this court will not likely be misled by the absonant argument that recovery must be denied respondent because forsooth her property had been repeatedly inundated by Arkansas River floods prior to the 1928 Act, and was in times long since past the ancient flood bed of a river. So indeed was most of the city of Washington.



3. **KINCAID v. UNITED STATES**, 35 Fed. (2d) 235, 37 Fed. (2d) 602, and 49 Fed. (2d) 768, was expressly pleaded by respondent (R. 11-12) because these carefully considered opinions of the lower Court in the Kincaid case led the Supreme Court of the United States to say:

"We may assume that, as charged, the mere adoption by Congress of a plan of flood control which involves an intentional, additional, occasional flooding of complainant's land *constitutes a taking* of it—as soon as the Government begins to carry out the project authorized. (Cases cited.) If that which has been done, or is contemplated, does constitute such a taking, the complainant can recover just compensation under the Tucker Act in an action at law as upon an implied contract, since the validity of the Act and the authority of the defendants are conceded. (Cases cited.)" *Hurley v. Kincaid*, 285 U. S. 95, 52 S. Ct. 267, 76 L. ed. 637.

(a) We first urge that the Supreme Court of the United States would not have carelessly indulged in this assumption of law by way of *obiter dictum* in a test case of such great importance, involving the property right of thousands of citizens of the United States and unusually large amounts of Government money, unless the Court had given most careful consideration to its solemn pronouncement. The able judges of this august body of *last resort* are not accustomed to talk loosely. This decision is a plain invitation to respondent in the case at bar to institute this identical action. *Deliberate dictum by the Supreme Court is controlling*. Title 28 U. S. C. A., Sec. 71, Note 8, p. 20.

(b) To support its assumption, the Supreme Court cites the cases of *United States v. Lynah*, 188 U. S. 445, 469, 23 S. Ct. 349, 47 L. ed. 539; *United States v. Cress*, 243

U. S. 316, 328, 37 S. Ct. 380, 61 L. ed. 746, 753; *Peabody v. United States*, 231 U. S. 530, 538, 34 S. Ct. 159, 58 L. ed. 351, 353; *Portsmouth Harbor Land & Hotel Co. v. United States*, 250 U. S. 1, 39 S. Ct. 399, 63 L. ed. 809; 260 U. S. 327, 329, 43 S. Ct. 135, 67 L. ed. 287, 289. A careful study of these decisions makes it clear that the Supreme Court was intending to recognize in its decision in the *Kincaid* case the legal principles upon which respondent herein now relies.

(c) This Court will further notice that the author of the syllabi understood that the case definitely upheld the position of the respondent now before this Court. While possibly not controlling, we understand that the syllabi of a decision of the United States Supreme Court are very carefully composed, and usually have the approval of the Court. In syllabus 2, the author states that the Court squarely decided that:

"One whose lands *may* be subjected to OCCASIONAL flooding as a direct consequence of the construction by the government of a floodway to relieve the channel of a river in times of high water *may*, AS SOON AS WORK ON THE PROJECT IS BEGUN, *maintain* an action at law under the Tucker Act against the government as upon an implied contract, for such compensation as might have been awarded had condemnation proceedings been instituted." 76 L. ed. 638. Because

"1. It may justifiably be assumed that the adoption by Congress of a plan of river flood control which involves an *intentional*, additional, *occasional* flooding of certain lands *constitutes a taking thereof* as soon as the government begins to carry out the project authorized." 76 L. ed. 637-638.

(d) Furthermore, as a matter of fact, the Supreme Court *did definitely determine* in *Hurley v. Kincaid, supra*, that Kincaid *did have* "a plain, adequate and complete remedy at law." This is the decision itself—*not obiter dictum*. Following its carefully considered opinion, the Court actually decides the case (and holds) in the following language:

"*AS the complainant HAS a plain, adequate and complete remedy at law*, the judgment is reversed with direction to dismiss the bill without prejudice." 76 L. ed., at p. 643.

(e) Furthermore, *the Supreme Court itself* later considered *Hurley v. Kincaid, supra*, as being *conclusive*. In illustrating what constitutes "a taking," in the case of *Jacobs v. United States*, 290 U. S. 13, 54 S. Ct. 26, 78 L. ed. 142, 96 A. L. R. 1, the Court held:

"The government *contemplated* the flowage of the lands, that damage would result therefrom, and that compensation would be payable. A *servitude* was created by reason of *intermittent* overflows which impaired the use of the land for agricultural purposes. \* \* \* *There was thus a partial taking of the lands for which the Government was bound to make just compensation under the Fifth Amendment.*" 78 L. ed., at p. 143.

To support the last sentence above quoted the Court cites *only three cases*, viz., *United States v. Cress, supra*; *United States v. Lynah, supra*; and *HURLEY v. KINCAID, supra*. A study of these *three cases*, applied to respondent's Petition now before this Court, will certainly lead inevitably to ultimate recovery by respondent. The Supreme Court itself deliberately links *Hurley v. Kincaid*, with the *Cress* case and the *Lynah* case as illustrating *what*

has acquired a very definite interest in respondent's land. What the Government has taken is "property" by all the judicial decisions. What the Government has taken, respondent has lost. Respondent's use, control and possession of her land is no longer *absolute*, complete, *unrestricted*, exclusive, unlimited or perpetual. Her integral dominion has been restricted by petitioner's assertion of its right to use whenever it desires by a definite, pre-determinate plan and design. Respondent's *title* has been definitely clouded, and any disposition of the land hereinafter made by her *must* be subject to the superior *property interest* of the Government in her land. Its *market value* has thus very materially been decreased and her *property rights* disastrously diminished. Respondent's "property" has been "taken" even though the land never has been actually used by its new owner, the Government, or physically flooded. Petitioner has asserted its ownership of *flowage rights* or the right to flood respondent's property; and that *property right* is in the United States under the Flood Control Act of May 15, 1928, even if actually a flood never thereafter comes.

Therefore what the petitioner had already taken from respondent when her suit was filed was a *servitude* pregnant with disaster, rather than any *physical damage* for which the petitioner would not be liable as is hereinafter shown. See C (1), this Point.

In this connection the opinion of the Supreme Court in *Portsmouth Harbor Land & Hotel Company v. United States*, 260 U. S. 327, 43 S. Ct. 135, 67 L. ed. 287, is particularly illuminating. There it is seen that the *intention* of the Government is probably the controlling test as to whether or not there has been a taking. There can be no

possible doubt in this case of the intention of the Government to dedicate and sacrifice respondent's land as a part of the floor of the Bbeuf Floodway. That decision also effectually disposes of petitioner's contention that it is not responsible for *fear* engendered in the minds of persons by the Jadwin Plan, and that the facts in the case show that loss of values are due wholly "to a fanciful and speculative apprehension" and do not constitute a taking, as follows:

"There is no doubt that a *serious loss* has been inflicted upon the claimant, as *the public has been frightened off the premises* by the imminence of the guns; and while it is decided that that and the previously existing elements of actual harm do not create a cause of action, it was assumed in the first decision that 'if the government had installed its battery, not simply as a means of defense in war, but *with the purpose* and effect of subordinating the strip of land between the battery and the sea to the *RIGHT* and *PRIVILEGE* of the government to fire projectiles directly across it for the purpose of practice or otherwise, whenever it saw fit, in time of peace, with the result of depriving the owner of its profitable use, **THE IMPOSITION OF SUCH A SERVITUDE WOULD CONSTITUTE AN APPROPRIATION OF PROPERTY FOR WHICH COMPENSATION SHOULD BE MADE.**' 231 U. S. 538. *That proposition we regard as clearly sound.*" *Portsmouth L. & H. Co. v. United States*; *supra*, 67 L. ed., at p. 289.

(c) What constitutes a "TAKING"?

A study of the authorities hereinbefore cited has led directly to a solution of the question: What legally constitutes a "taking," within the constitutional sense, as ap



constitutes a "taking" of the lands for which the Government is bound to make just compensation under the Fifth Amendment.

4. The CONSTITUTION, Fifth Amendment, guarantees to respondent as against the petitioner, to every individual property owner as against the Government; "nor shall private *property* be taken for public use, without just compensation."

This leads us to an immediate investigation of (first) what is "*property*"; and (second) what constitutes "*a taking*."

(a) *What is "Property"?*

It is obvious from even a casual reading of its opinion (R. 376-390) that the District Court missed the mark of the legal concept of the term "*property*." The District Court erred in refusing respondent's requested Conclusion of Law No. 29 (R. 340), which correctly declares:

"In a strict legal sense, *land is not 'property,'* but is the subject of property. Property is entirely the creature of the law. It belongs not to physics but to metaphysics, and is *altogether a creature of the mind*. Property in a determinate object is composed of certain constituent elements, namely, the *unrestricted, exclusive and perpetual right of use, enjoyment and disposal of that object*. These rights cannot be materially abridged without, *ipso facto*, taking the owner's property, *Anything which destroys any of these elements to that extent destroys the property itself*. The constitution protects these essential attributes of property. An *easement is property*. Any regulation which imposes a restriction on the use of the property by its owner, and any public improvement which tends to impair the

unrestricted enjoyment of property by affecting some right or easement appurtenant thereto may constitute a public use or taking within the meaning of the Constitution. *Anything* which destroys or subverts the *exclusive* right to freely use, enjoy and dispose of any determinate objects, real or personal, constitutes a 'taking' or destruction *pro tanto* of *property*, notwithstanding there is no disturbance of possession or actual or physical invasion of the *locus in quo*" (R. 340).

"*Property* is the sum of all the rights and powers incident to ownership." *Nashville C. & St. L. Ry. Co. v. Wallace*, 288 U. S. 249, 53 S. Ct. 345, 87 A. L. R. 1191, 77 L. ed. 730, 738.

"The privilege of *use* is *only one* attribute, among many, of the bundle of privileges that make up property or ownership."

*Hennaford v. Silas Mason Co.*, 300 U. S. 577, 582, 57 S. Ct. 524, 81 L. ed. 814, at p. 818;

*Nashville C. & St. L. Ry. Co. v. Wallace*, *supra*;

*Bromley v. McCaughn*, 280 U. S. 124, 136-138, 50 S. Ct. 46, 74 L. ed. 226, 229, 230;

*Burnet v. Wells*, 289 U. S. 670, 676, 678, 53 S. Ct. 61, 77 L. ed. 1439, 1443;

*Mann v. McCarroll, Commissioner, etc.*, (Ark.) decided June 26, 1939, 70 The Law Reporter 700, at p. 704.

No one familiar with the decisions will go astray as to the judicial connotation of the word "property" as it is used in the Constitution.

50 *Corpus Juris*, p. 729, sec. 2; and numerous cases cited in footnotes.

22 *Ruling Case Law*, pp. 37-39, secs. 2 and 3; and cases cited.

50 *Corpus Juris*, p. 745, sec. 17.

Lewis, *Eminent Domain* (3d ed.), secs. 63, 64, and 65, pp. 51-58; and cases there cited.

*Spann v. City of Dallas*, 111 Tex. 350, 235 S. W. 513, 19 A. L. R. 1387, at p. 1390.

*Buchanan v. Warley*, 245 U. S. 60, 38 S. Ct. 16, 62 L. ed. 149.

*Eaton v. Boston C. & M. R. R. Co.*, 51 N. H. 504, 12 Am. Rep. 147.

*Transcontinental Oil Co. v. Emmerson*, 298 Ill. 394, at p. 401, 131 N. E. 645, 16 A. L. R. 507, 512.

*Shedd v. Patterson*, 312 Ill. 371, at p. 374, 144 N. E. 5, 6.

*Tatum Bros., etc., Co. v. Watson*, 92 Fla. 278, at p. 289, 109 So. 623, 626.

*C. B. & Q. R. Co. v. Public Utilities Com.*, 69 Col. 275, at p. 279, 193 Pac. 726.

*In re: Crook*, 219 Fed. 979, at p. 985.

*Watson v. Wolf*, 162 Pa. 153, at p. 169, 29 Atl. 646, 652.

*Grand Rapids Booming Co. v. Jarvis*, 30 Mich. 308, at p. 320-321.

*Holst v. Savannah Elec. Co.*, 131 Fed. 931, at p. 942-943.

*State v. Kreutzberg*, 114 Wis. 530, at p. 534, 90 N. W. 1098, 1100.

*Pennsylvania R. R. Co. v. Angel*, 41 N. J. E. 316, at p. 329, 7 Atl. 432.

*Smith v. Campbell*, 10 N. C. 590, at p. 597.

See Appendix C.

In an exhaustive opinion by District Judge Westerhaven on the question of *what is property*, we find the following very clear statement:

“The argument supporting this ordinance proceeds, it seems to me, both on a mistaken view of *what is property* and what is *police power*. Property, generally speaking, defendant's counsel conceding, is protected against a taking without compensation by the guarantees of the Ohio and United States Constitutions; but their views seem to be

that, so long as the owner remains clothed with a legal title thereto and is *not ousted from the physical possession thereof*, his property is not taken, no matter to what extent his right to use it is invaded or destroyed or its *present or prospective value is depreciated*. *This is an erroneous view*. The right to the property, as used in the Constitution, has no such limited meaning.

"As has often been cited in substance by the Supreme Court there can be no conception of property, aside from its control and use, and upon its use depends its value. See *Cleveland, etc., R. R. v. Backus*, 154 U. S. 439; *Branson v. Bush*, 251 U. S. 182; *Block v. Hirsch*, 256 U. S. 135; *Pennsylvania Company v. Mahon*, 260 U. S. 414; *Buchanan v. Warley*, 245 U. S. 60.

"In Ann. Cas. 1918 A, 1201, Mr. Justice Day, amplifying says: 'Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use and dispose of. *The Constitution protects these essential attributes of property.*' (Cases cited). Property consists of the free use, enjoyment and disposal of a person's acquisition, *without control or diminution, save by the law of the land.*' *Ambler Realty Co. v. Village of Euclid*, 297 Fed. 312, 313.

"*Anything which destroys or subverts exclusive right to freely use, enjoy and dispose of any determinate object, real or personal, constitutes a 'taking' or destruction pro tanto of property, notwithstanding there is no disturbance of possession or actual or physical invasion of locus in quo.*"

*Prairie Pipe Line Co. v. Shipp*, 305 Mo. 663; at p. 672, 267 S. W. 647.

In speaking of even so incorporeal a form of "property" as a contract, this court said:

"The *contract* in question was *property* within the meaning of the Fifth Amendment, and if taken for public use the Government would be liable."

*Omnia Commercial Co., Inc. v. United States*, 261 U. S. 502, 43 S. Ct. 437, 67 L. ed. 773.

And so also, a mere *franchise* is such property. *Monongahela Navigation Co. v. United States*, 148 U. S. 312, 13 S. Ct. 622, 37 L. ed. 463.

The cutting off of a private way across the lands of others, the right of ingress and egress, is a taking of "*property*" for which compensation must be made. *United States v. Welch*, 217 U. S. 333, 30 S. Ct. 527, 54 L. ed. 787, 28 L. R. A. (N. S.) 385, 19 Ann. Cas. 680.

"The *property* taken may itself be no more than an *easement*, \* \* \*."

*Drainage Commissioners v. Knox*, 237 Ill. 148, 152, 86 N. E. 636, 637.

"A claim that action is being taken under the *police power* of the state cannot justify disregard of constitutional inhibitions (cases cited)."

*Panhandle E. Pipe Line Co. v. State Highway Com.*, 294 U. S. 613, 55 S. Ct. 563, 79 L. ed. 1090, at p. 1095.

Counsel for petitioner throughout this litigation have erroneously insisted that "*property*" is a *tangible, physical, material thing*. They assume that unless physical trees have been uprooted, material soil has been washed away, visible ditches have been filled, tangible houses and personal property have been destroyed, and tons of water, debris and silt have overwhelmed the physical areas of land owned by respondent, then her "*property*" has not



been taken or damaged. Not so. Such is not the nature of "property"; and such is not the law. See Appendix C.

"It would be a very curious and unsatisfactory result, if, in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the Government, and which has received the commendation of jurists, statesmen and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public, it can destroy its *value* entirely, *can inflict irreparable and permanent injury to any extent*, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as these rights stood at the common law, instead of the government, and make it an authority for the *invasion of private right* upon the pretext of the public good, which had no warrant in the laws or practices of our ancestors." *Pumpelly v. Green Bay & Miss. River Canal Co.*, 13 Wall. 166, 20 L. ed. 557, at p. 560; *Lewis, Eminent Domain*, (3d Ed.) Sec. 68, Note 26, at pp. 66-67.

(b) WHAT has been "taken"?

In the instant case the petitioner has appropriated to itself the right to use respondent's land as a floodway at any and all times when the Government deems it necessary or expedient. The Government has impressed a distinct *servitude* upon respondent's property, and to this extent

plied to respondent's property? The answer is inescapable. The Flood Control Act of May 15, 1928, which involves and contemplates an intentional, additional, occasional flooding of respondent's land, and imposes thereon a servitude for that purpose, constituted a taking of respondent's property as soon as the Government began to carry out the project authorized. *Hurley v. Kincaid*, 285 U. S. 95, 52 S. Ct. 267, 76 L. ed. 637.

*Other and Earlier Decisions.* Court decisions prior to the Flood Control Act of May 15, 1928, and not involving that Act, are not pertinent precedents. As hereinbefore shown, by that Act the Congress for the first time deliberately assumed Government liability, and intentionally changed the rule of law theretofore established by judicial decisions as relating to Government responsibility. Notwithstanding this, as though worshipping at the shrine of a fetish, petitioner's counsel continue to harp on such old decisions as *Cubbins v. Mississippi River Commission*, 241 U. S. 351, 36 S. Ct. 671, 60 L. ed. 1041; *Jackson v. United States*, 230 U. S. 1, 33 S. Ct. 1011, 57 L. ed. 1363; *Hughes v. United States*, 230 U. S. 24, 33 S. Ct. 1019, 57 L. ed. 1374; *Sanguinetti v. United States*, 264 U. S. 146, 44 S. Ct. 264, 68 L. ed. 608; *Horstmann Co. v. United States*, 257 U. S. 138, 42 S. Ct. 58, 66 L. ed. 171; *Bedford v. United States*, 192 U. S. 217, 24 S. Ct. 238, 48 L. ed. 414; *Gibson v. United States*, 166 U. S. 269, 17 S. Ct. 578, 41 L. ed. 996, *et cetera*. Such authorities are more fully hereinafter distinguished and shown not to be applicable to the case at bar. See Point X of this brief.

Nevertheless, it is interesting to note the evolution in the Court decisions of the judicial conception of what constitutes "a taking" of property in the constitutional sense.

The legal principle involved is found in embryo in even the early cases, and when these decisions are studied chronologically the broadening growth of the constitutional idea of "a taking" is more fully appreciated. The facts of the respective cases are immaterial and irrelevant save only as the screen upon which has been pictured for inspection and consideration the ever broadening principle of constitutional liability. No prior decision has ever involved the facts of the case now before the court, unless it be the case of *Hurley v. Kincaid*, *infra*. No decision prior to the Flood Control Act of May 15, 1928, can be entirely apposite, applicable, relevant or equiparant. That Act changed former judicial rules by legislative edict, the authoritative decree now controlling this court. Now, by this statute,

"A plan of river flood control which involves an intentional, additional, occasional flooding of certain lands constitutes a taking thereof as soon as the Government begins to carry out the project authorized."

*Hurley v. Kincaid*, 285 U. S. 95, 52 S. Ct. 267, 76 L. ed. 637.

*Jacobs v. U. S.*, 290 U. S. 13, 54 S. Ct. 26, 78 L. ed. 142.

But even so, in *Pumpelly v. Green Bay & Miss. River Canal Co.*, 13 Wall. 177, 20 L. ed. 557, we find a statement of the fundamental principles on which liability rests stated in the syllabi as follows:

"3. By the general law of European nations and the common law of England, it was a qualification of the right of eminent domain, that compensation should be made for private property taken or sacrificed for public use.

"4. And the constitutional provisions of the United States, and of the several States which declare that private property shall not be taken for public use without just com-

pensation, were intended to establish this principle beyond legislative control.

"5. *It is not necessary that property should be absolutely taken*, in the narrowest sense of the word, to bring the case within the protection of this constitutional provision; but there may be such serious interruption to the common and necessary use of the property as will be equivalent to taking, within the meaning of the statute.

"6. The backing of water so as to overflow the lands of an individual, or any other superinduced addition of water, earth, sand or other material, or artificial structure placed on land, if done under statutes authorizing it for the public benefit, is such a taking as, by the constitutional provisions, demands compensation." And

In *United States v. Great Falls Mfg. Co.*, 112 U. S. 645; 5 S. Ct. 306, 28 L. ed. 846, the syllabi are as follows:

"1. Where property to which the United States asserts no title is taken by its officers or agents pursuant to an Act of Congress, as private property, for the public use, the Government is under an *implied obligation* to make just compensation to the owner.

"2. Such an implication being consistent with the constitutional duty of the Government, as well as with *common justice*, the owner's claim for compensation is one arising out of *implied contract*, within the meaning of the statute defining the jurisdiction of the Court of Claims, *although there may have been no formal proceedings for the condemnation of the property to public use.*"

"3. The owner may waive any objection he might be entitled to make, based upon the want of such formal proceedings and *electing to regard the action of the Government as a taking under its sovereign right of eminent do-*

main, may demand just compensation for the property." And

In *Great Falls Mfg. Co. v. Garland, Attorney General*, 124 U. S. 581, 8 S. Ct. 631, 31 L. ed. 527, the general principle is stated:

"The Government is under a constitutional obligation to make compensation for any property or right taken, used and held for the purposes indicated in such Act of Congress, whether it is embraced or described in said survey or map, or not."

In *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 13 S. Ct. 622, 37 L. ed. 463, it is held that THE QUESTION OF COMPENSATION IS JUDICIAL. The syllabi are as follows:

"The compensation for private property taken for public use must, under the 5th Amendment of the Constitution, be a full and perfect equivalent for the property taken.

"The Legislature may determine what private property is needed for public purposes, but *when the taking has been ordered, then the question of compensation is judicial.*

"The court is not concluded by the declaration in the Act of Congress directing the taking for public use of the lock and dam No. 7, of the Monongahela Navigation Company, that the *franchise* of said company to collect tolls shall not be considered in estimating the sum to be paid for the property.

"The right of the national Government, under its grant of power to regulate commerce, to condemn and appropriate lock and dam No. 7 on the Monongahela River belonging to the Monongahela Navigation Company, is subject to the *limitations imposed by the 5th Amendment*, that private property shall not be taken for public uses without just com-



pensation; such just compensation requires payment for the franchise to take tolls, as well as for the value of the tangible property; and the assertion by Congress of its purpose to take the property does not destroy the State franchise.

"Congress has supreme control over the regulation of commerce, but if in exercising that supreme control, it deems it necessary to take private property, then it must proceed subject to the limitations imposed by this 5th Amendment, and can take only on payment of just compensation."

*United States v. Lynah*, 188 U. S. 445, 23 S. Ct. 349, 47 L. ed. 539, is often cited as the leading case on Government liability for property damaged or taken for public use. The entire opinion repays careful study. The following extracts are illuminating:

*"The making of the improvements necessarily involves the taking of property; \* \* \*. The law will imply a promise to make the required compensation, where property to which the Government asserts no title, is taken, pursuant to an act of Congress, as private property to be applied for public uses.*

*"Such an implication being consistent with the constitutional duty of the Government, as well as with common justice, the claimant's cause of action is one that arises out of implied contract, within the meaning of the statute which confers jurisdiction upon the Court of Claims of actions founded 'upon any contract, express or implied, with the Government of the United States.' " \* \* \**

*"Was there a taking? There was no proceeding in condemnation instituted by the Government, no attempt in terms to take and appropriate the title. There was no ad-*

judication that the fee had passed from the land owner to the Government, and if either of these be an essential element in the taking of lands, within the scope of the 5th Amendment, there was no taking. \* \* \*

"It is clear from these authorities that where the Government by the construction of a dam or other public works so flood lands belonging to an individual as to substantially destroy their value there is a taking within the scope of the 5th Amendment. While the Government does not directly proceed to appropriate the title, yet it takes away the use and value; when that is done it is of little consequence in whom the fee may be vested. \* \* \*

"But if any one proposition can be considered as settled by the decisions of this court it is that, although in the discharge of its duties the Government may appropriate property, it cannot do so without being liable to the obligation cast by the 5th Amendment of paying just compensation.

"\* \* \* Here there is no finding, no suggestion, that by any expense the flooding could be averted." *United States v. Lynah, supra*. So is it in the case at bar.

**GUN CASES.** The Gun cases, *Peabody v. United States*, 231 U. S. 530, 34 S. Ct. 159, 58 L. ed. 351, *Portsmouth Harbor, Land & Hotel Co. v. United States*, 250 U. S. 1, 63 L. ed. 809, and *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U. S. 327, 67 L. ed. 287, should be read in sequence and studied together. In the first two cases liability was denied because damages could not be based upon mere apprehension of possible future damages. It was made clear by the findings that:

"It does not appear from the evidence that there is any intention on the part of the government to fire any of

its guns now installed, or which may hereafter be installed, at said fort in time of peace over and across the lands of the claimants so as to deprive them of the use of the same or any part thereof, or to injure the same by concussion or otherwise," etc. 58 L. ed. at p. 353.

In the case at bar, the *intention* on the part of the Government to use the Boeuf Basin floodway whenever necessary is indisputably proved by merely reading House Document No. 90 (the Jadwin Plan), given the force and sanction of law by the Flood Control Act of May 15, 1928.

The last case above cited compels a finding of liability in this Boeuf Floodway suit. The apposite principle found in *Portsmouth Harbor Land & Hotel Company v. United States*, 260 U. S. 327, 67 L. ed. 287, is as follows:

"There is no doubt that a serious loss has been inflicted upon the claimant, as the public has been frightened off the premises by the imminence of the guns; and while it is decided that that and the previously existing elements of actual harm do not create a cause of action, it was assumed in the first decision that 'if the Government has installed its battery, not simply as a means of defense in war, but with the purpose and effect of subordinating the strip of land between the battery and the sea to the right and privilege of the Government to fire projectiles directly across it for the purpose of practice or otherwise, whenever it saw fit, in time of peace, with the result of depriving the owner of its profitable use, the imposition of such a servitude, would constitute an appropriation of property for which compensation should be made.' 231 U. S. 538. That proposition we regard as clearly sound. The question is whether the petition before us presents the case supposed." \* \* \*

" \* \* \* If the United States, with the admitted *intent* to fire across the claimants' land at will, should fire a single shot or put a fire control upon the land, it well might be that the taking of a right would be complete. But even when *the intent* thus to make use of the claimants' property is not admitted, while a single act may not be enough, a continuance of them in sufficient number and for a sufficient time may prove it. Every successive trespass adds to the force of the evidence. The establishment of a fire control is an indication of *an abiding purpose*. The fact that the evidence was not sufficient in 1905 does not show that it may not be sufficient in 1922. As we have said, *the intent* and the overt acts are alleged, as is also the conclusion that the United States has taken the land. That we take to be stated as a conclusion of fact, and not of law, and as intended to allege the actual import of the foregoing acts. In our opinion the specific facts set forth would warrant a finding that a servitude has been imposed. \* \* \*

" \* \* \* If the acts amounted to a taking, without assertion of an adverse right, a contract would be implied, whether it was thought of or not." 67 L. ed. 289-290.

*United States v. Cress*, 243 U. S. 316, 37 S. Ct. 380, 61 L. ed. 746, is valuable in establishing the proposition that liability is *not* dependent upon a *total destruction of value*. After reviewing many cases of liability, the court, in its opinion holds: "It is contended \* \* \* that the damage to Cress's land by the overflow of 6 6/10 acres, because it *depreciated its value only to the extent of one-half, does not measure up to a taking, but is only a 'partial injury,'* for which the Government is not liable. The findings, however, render it plain that this is not a case of temporary flooding or of *consequential injury*, but a *permanent con-*



# MICRO CARD

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*dition*, resulting from the erection of the lock and dam, by which the land is 'subject' to frequent overflows of water from the river. That overflowing lands by permanent backwater is a direct invasion, amounting to a taking, is settled by *Pumpelly v. Green Bay & M. Canal Co.*, 13 Wall. 166, 177, 20 L. ed. 557, 560; *United States v. Lynah*, 188 U. S. 445, 468-470, 47 L. ed. 539, 547-549, 23 Sup. Ct. Rep. 349. It is true that in the *Pumpelly* Case there was an almost complete destruction, and in the *Lynah* case a complete destruction, of the value of the lands, while in the present case the value is impaired to the extent of only one-half. But it is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question whether it is a taking.

"\* \* \* While the Government does not directly proceed to appropriate the title, yet it takes away the use and value; when that is done it is of little consequence in whom the fee may be vested. \* \* \* There is no difference of kind, but only of degree, between a permanent condition of continual overflow by backwater and a permanent liability to intermittent but inevitable recurring overflows; and, on principle, the right to compensation must arise in the one case as in the other. If any substantial enjoyment of the land still remains to the owner, it may be treated as a partial instead of a total divesting of his property in the land. \* \* \* where formal proceedings are initiated by the party condemning, it is usual and proper to specify the precise interest taken, where less than the fee. But where, as in this case the property owner resorts to the courts, as he may, to recover compensation for what actually has been taken, upon the principle that the Government, by the very act of taking,

impliedly has promised to make compensation because the dictates of justice and the terms of the 5th Amendment so require (cases cited), and it appears that less than the whole has been taken and is to be paid for, such a right or interest will be deemed to pass as is necessary fairly to effectuate the purpose of the taking." *United States v. Cress, supra.*

In *Jacobs v. United States*, 45 F. (2d) 34, (C. C. A. 5th) in holding liability against the government, the court uses the following language particularly applicable to the case now before this court:

"It plainly appears\* \* \* from the acts of Congress above quoted from that in planning and erecting the dam mentioned *the Government contemplated that flowage damage to privately owned property would result therefrom, for which compensation would be payable.* The court's findings of facts including findings to the effect that the dam mentioned *slightly increased the height of intermittent rises in the river, that the overflows reaching the appellant's land after the construction of the dam were not continued, but occasional; that his land which had been subject to overflow before the dam was built became slightly more subject to such overflows since its construction; that appellant's customary use of his land was prevented for short periods of time; and that the use of the land for agricultural purposes was impaired by the floodwaters after the dam was built.* Thus it appears that the burden of *the servitude to which, by reason of intermittent overflows, land of appellant was subject before the dam was erected was increased as a result of the erection of the dam, and that the erection of the dam had the effect of interrupting appellant's customary use of his land, and of impairing to*

some extent the use of that land for agricultural purposes. As a riparian owner, appellant had the right to enjoyment of the natural flow of the river without burden or hindrance imposed by artificial means, and no public easement beyond the natural one can arise without grant or dedication, save by condemnation with appropriate compensation for the private right. *United States v. Cress*, 243 U. S. 316, 321, 37 S. Ct. 380, 385; 61 L. ed. 746."

*Jacobs v. United States*, *supra*. See also 63 F. (2d) 327, affirmed 290 U. S. 13, 54 S. Ct. 26, 78 L. ed. 142.

In affirming the *Jacobs* case, the Supreme Court of the United States stated:

"The Government contemplated the flowage of the lands, that damage would result therefrom, and that compensation would be payable. A servitude was created by reason of intermittent overflows which impaired the use of the lands for agricultural purposes. \* \* \* There was thus a partial taking of the lands for which the Government was bound to make just compensation under the Fifth Amendment." 290 U. S. 13, 54 S. Ct. 26, 78 L. ed. 142.

In support of the last quotation the Supreme Court cites as authority its former decision in *Hurley v. Kincaid*, 285 U. S. 95, 52 S. Ct. 267, 76 L. ed. 637, together with the *Lynch* and *Cress* cases, and the court again calls attention to the fact that:

"The fact that the condemnation proceedings were not instituted and that the right was asserted in suits by the owners did not change the essential nature of the claim. The form of the remedy did not qualify the right. It rested upon the Fifth Amendment. Statutory recognition was not necessary. Such a promise was implied because of the duty

to pay imposed by the Amendment. The suits were thus founded upon the Constitution of the United States. U. S. C. A. title 28, Sec. 41 (20)."

*Jacobs v. United States*, 290 U. S. 13, 54 S. Ct. 26, 78 L. ed 142.

In *Pennsylvania Coal Company v. Mahon*, 260 U. S. 393, 43 S. Ct. 158, 67 L. ed. 322, the court held that a statute forbidding the mining of coal under private dwellings or streets or cities in places where the right to mine such coal is reserved in the grant is unconstitutional, *as taking property* without due process of law. In the opinion the court says:

"The general rule, at least, is that while property may be regulated to a certain extent, *if regulation goes too far it will be recognized as a taking*. We are in danger of forgetting that a strong public desire to improve the public conditions is not enough to warrant achieving the desire by a shorter cut than the *constitutional way of paying* for the change." 67 L. ed., pp. 325, 326.

See also opinions in the following cases which discuss, illustrate and clarify what constitutes "a taking:"

*Miss. & R. R. Boom Co. v. Patterson*, 98 U. S. 403, 25 L. ed. 206, 208.

*United States v. Williams*, 188 U. S. 485, 23 S. Ct. 363, 47 L. ed. 554.

*Manigault v. Springs*, 199 U. S. 473, 26 S. Ct. 127, 50 L. ed. 274, at p. 280.

*United States v. Welch*, 217 U. S. 333, 30 S. Ct. 527, 54 L. ed. 787.

*United States v. Sewell*, 217 U. S. 601, 30 S. Ct. 691, 54 L. ed. 897.

*United States v. Grizzard*, 219 U. S. 180, 31 S. Ct. 162, 55 L. ed. 165, at p. 166.



- Curtin v. Benson*, 222 U. S. 78, 32 S. Ct. 31, 56 L. ed. 102, at pp. 105-106.
- Philadelphia Co. v. Stimson*, 223 U. S. 605, 32 S. Ct. 340, 56 L. ed. 570.
- Richards v. Washington Terminal Co.*, 233 U. S. 6, 34 S. Ct. 654, 58 L. ed. 1088.
- United States v. North American Transp. & Trading Co.*, 253 U. S. 330, 40 S. Ct. 518, 64 L. ed. 935, at p. 937.
- Duckett & Co. v. United States*, 266 U. S. 149, 45 S. Ct. 38, 69 L. ed. 216, at p. 219.
- Campbell v. United States*, 266 U. S. 368, 45 S. Ct. 115, 69 L. ed. 328, at p. 330.
- Panhandle E. Pipe Line Co. v. State Highway Com.*, 294 U. S. 613, 55 S. Ct. 563, 79 L. ed. 1090.
- Hersch v. United States*, 15 Ct. Cls. 385.
- Merriam v. United States*, 29 Ct. Cls. 250, at pp. 258-259.
- Wayne County, Ky. v. United States*, 53 Ct. Cls. 417; aff'd. 252 U. S. 574, 40 S. Ct. 394, 64 L. ed. 723.
- Chappel v. United States*, 34 Fed. 673, 674-675.
- In Re: Delafield*, 109 Fed. 577, 579-580.
- United States v. Hess*, 70 Fed. (2d) 142, and 71 Fed. (2d) 78.
- United States v. Chicago, B. & Q. R. Co.*, (C.C.A. 8th) 82 Fed. (2d) 131, 106 A. L. R. 942.
- United States v. Wabasha-Nelson Bridge Co.*, (C.C.A. 7th) 83 Fed. (2d) 852.
- Fruth v. Board of Affairs*, 75 W. Va. 456, 460-461, 84 S. E. 105, 106, L. R. A. 1915C 981.
- Bruch v. Carter*, 32 N. J. L. 554, at pp. 561-562.
- Fitzhugh v. City of Jackson*, 132 Miss. 585, 610, 97 So. 190, 33 A. L. R. 279.
- Lovett v. West Virginia Central Gas Co.*, 65 W. Va. 739, 743, 65 S. E. 196, 24 L. R. A. (N. S.) 230.
- Traut v. White*, 46 N. J. E. 437, 440, 19 Atl. 196.
- Myer v. Adam*, 71 N. Y. S. 707, at p. 710.
- Wateree Power Co v. Rion*, 113 S. C. 303, 308, 102 S. E. 331.



*Forster v. Scott*, 136 N. Y. 577, 584-585, 32 N. E. 976,  
18 L. R. A. 543.

*St. Louis v. Hill*, 116 Mo. 527, 533-534, 22 S. W. 861, 21  
L. R. A. 226.

*School Corporation v. Heiney*, 178 Ind. 1, 7-8, 98 N. E.  
628, 43 L. R. A. (N. S.) 1023.

*Glover v. Powell*, 10 N. J. E. 211, at p. 229.

*In Re: Jacobs*, 98 N. Y. 98, 105.

*Old Colony, etc., R. Co. v. County*, 14 Gray 155, at p.  
161.

*Thompson v. Androscoggin River Imp. Co.*, 54 N. H.  
545, 552.

*Stockdale v. Rio Grande W. R. Co.*, 28 Utah 201, 210-  
211, 77 Pac. 849, 852.

*People ex rel. M. W. Advertising Co. v. Murphy*, 113  
N. Y. S. 855, 857.

*Webster County v. Lutz*, 234 Ky. 618, 625, 28 S. W.  
(2d) 966.

*Martin, et al., ex parte*, 13 Ark. 198, at pp. 206-207.

*Lewis, Eminent Domain*, (3d ed.) sec. 889, p. 1545.

*Lewis, Eminent Domain*, (3d ed.) sec. 71, p. 69.

*Lewis, Eminent Domain*, (3d ed.) sec. 74, pp. 73-76.

*Lewis, Eminent Domain*, (3d ed.) sec. 75, p. 78.

*Lewis, Eminent Domain*, (3d ed.) sec. 78, pp. 86-88.

*Lewis, Eminent Domain*, (3d ed.) sec. 85, p. 100.

*Lewis, Eminent Domain*, (3d ed.) sec. 88, p. 107.

*Lewis, Eminent Domain*, (3d ed.) sec. 112, p. 154.

20 *Corpus Juris*, p. 684, sec. 147.

See Appendix D to this brief.

The opinion of the Supreme Court in *Richards v. Washington Terminal Company*, *supra*, is peculiarly applicable in principle to the facts in the case at bar, and its language could well be paraphrased and applied in the instant case. See 233 U. S. 546, 34 S. Ct. 654, 58 L. ed. 1088, at p. 1093. See Appendix D.

In a carefully considered, essentially sound, decision of the Arkansas Supreme Court, in determining the valid-

ity of an act of the General Assembly in 1851 providing for the reclaiming of swamp and overflowed lands by levees and drains, but making no provision for the compensation of individuals for property taken or injured in constructing such levees and drains, the court said:

“The constitution of this State contains no provision that private property shall not be taken for public use, without just compensation; yet, we hold that *this prohibition upon the Legislature, is implied from the nature and structure of our Government*, even if it were not embraced by necessary implication in other provisions of the bill of rights. The right of eminent domain is inherent in the Government or sovereign power, and equally so is, or ought to be, in every Government of laws, the vested right to his property in the citizen; and the *right of eminent domain means that, when the public necessity or common good requires it, the citizen may be forced to sell his property for its fair value. The duty of making compensation may be regarded as a law of natural justice*, which has its sanction in every man’s sense of right, and is recognized in the most arbitrary Governments. *To suppose that the Legislature, under our constitution, possessed the power of divesting the citizen of his right to property without first providing in some equitable mode for ascertaining its value, and making him compensation for it, and could exercise this power without restraint, would be subversive of the Government and equivalent to revolution and anarchy, since it would defeat one of the primary objects for which the Government was established.* \* \* \* The right of the citizen to acquire, possess and protect property, thus guaranteed to all by the fundamental law, being a limitation imposed by the people upon the Government of their own creation, and

designed to protect the weak against the strong, the minority against the majority, would be of little avail and but an empty sound, if the legislative department possesses the power to divest him of it without adequate compensation, through caprice, or even in the exercise of honest but misguided judgment, or, upon that most dangerous of all pretenses, for State reasons, and the policy of promoting what may be deemed the public good."

*Martin et al. Ex parte*, 13 Ark. 198, 206-207.

"An implied promise is created by law as well as by natural justice that the owner of property shall receive its value from a party who may have appropriated it to his use and benefit. This is as much the case where the Government enjoys the property as in the instances of a private individual." *Hersch v. United States*, 15 Ct. Cls. 385.

"The police power springs from the obligation of the state to protect its citizens and provide for the safety and good order of society. Under it there is no *unrestricted authority* to accomplish whatever the public may presently desire." "The police power of the state cannot justify disregard of constitutional inhibitions." "The taking of property for public use, without compensation, ordinarily, is inhibited by the Fourteenth Amendment."

*Panhandle East Pipe Line Company v. State Highway Com.*, 294 U. S. 613, 55 S. Ct. 563, 79 L. ed. 1090.

*Recent Decisions.* Such recent decisions as *United States v. Chicago, B. & Q. R. Co.*, *supra*, and *United States v. Wabasha-Nelson Bridge Co.*, *supra*, nicely illustrate the judicial evolution of the legal concept involved in the Fifth Amendment prohibiting the taking of private property for public use without just compensation. In *Chicago, B. & Q.*

*R. Co., supra*, decided February 10, 1936, the present lack of controlling value of the old decisions, on which counsel for petitioner continue to rely with such bulldog tenacity, is pointed out by the Court (C.C.A. 8th), in the following language:

"It is probable that *time was* when many of the States of the Union, on the matter of condemnation of private property for public use, *gave damages only when the property was actually taken*, and for so much as was actually taken, and refused to award compensation in cases wherein such property, or the remainder of the parcel, was only hurt or damaged as a consequence of the actual taking. But *long since*, recognizing the utter injustice of so narrow a view, amendments to the organic laws, to statutes, and *changes in judicial interpretation* well-nigh universally, have so *changed the rule* as now to give compensation for proximate damages to remaining parts of a parcel of land when some part thereof has been actually taken. In short, such change was wrought by adding to the word 'taken' in the provisions of the Constitution, or to the statute, *or by judicial interpretation*, the words '*or damaged.*'

"Many early decisions of numerous state courts, and federal courts as well (cf. *Gibson v. United States*, 166 U. S. 269, 17 S. Ct. 578, 41 L. ed. 996), may, it is probable, be found, in which, in effect it was held that compensation could be recovered only for the fair market value of the land actually expropriated, and that nothing could be recovered for damages accruing to other lands, or parts of the parcel taken, when such were not actually taken but only damaged, that is, *reduced in value*, or use, by the taking of other portions of the affected parcel.

"BUT THIS RULE WAS, SO OBVIOUSLY UNJUST THAT IT HAS BECOME OUTMODED AND BEEN DISCARDED PRACTICALLY IN ALL JURISDICTIONS. . . .

"For the identical principle, now found in the *recent liberalized views* of what constitutes 'just compensation,' was long ago, in the Bauman Case, *supra*, laid down thus: 'The just compensation required by the Constitution to be made to the owner is to be measured by the loss caused to him by the appropriation. He is entitled to receive the value of what he has been deprived of, and no more. To award him less would be unjust to him; to award him more would be unjust to the public.' " 82 Fed. (2d) at pp. 134-135.

Any number of additional, supporting authorities could be cited; but the foregoing should suffice to portray the principles sustained by the overwhelming weight of authority in the judicial world, principles which, as they are read, this court will instinctively apply to the facts in the present case as reflected by the allegations of the petition and this record. See Appendix D.

When the petition in the case at bar is read in the light of the foregoing authorities, the petitioner must expect an adjudication of "taking" in the constitutional sense, as the Congress intended. The material allegations of the petition are indubitably established by official records and uncontradicted testimony. The admitted facts impel the judicial mind to the irresistible conclusion of petitioner's liability. There is no logical escape. Every requirement of natural justice, common sense and judicial reasoning conspires to write judgment here for respondent.



(d) **WHEN was the property "taken"?**

This court is evidently of the opinion that the "taking" under the Flood Control Act of May 15, 1928, was complete, and respondent's right of action accrued, "as soon as the Government *begins* to carry out the project authorized." *Hurley v. Kincaid*, 285 U. S. 95, 52 S. Ct. 267, 76 L. ed. 637. Thus the Court recognized that the Flood Control Act adopted, and authorized the construction of, "one, unified, comprehensive flood control plan"; that the entire project is indeed *one, single project*, the entire Jadwin Plan being a *unit*. See Point II this brief.

The "taking" of respondent's property was effected and completed by the following overt acts by petitioner, to-wit:

(1) Passage of the Flood Control Act of May 15, 1928, adopting, and authorizing the completion of, the Jadwin Plan, when approved by the President (R. 118); followed by

(2) The President's proclamation of August 13, 1928, approving the Jadwin Plan (R. 128); followed by

(3) The President's proclamation of January 10, 1929, definitely authorizing condemnation of land for rights-of-way for the Boeuf Floodway (R. 128).

Thereby the project became "fixed and not subject to review or change," save only by the Congress. See House Com. Doc. No. 2, 71st Congress, 1st session (R. 127-129). Thus, clearly, for the first time, the Boeuf Floodway became definite, fixed and certain on January 10, 1929, which date we affirm to be the time of the taking by the Government of respondent's property.

As was stated by the then Attorney General of the United States on July 19, 1929:

"Nowhere in the act does it appear that any latitude whatever is permitted with respect to the project covered by the act, save and except as is provided for in connection with the recommendations of the special board and the decision of the President thereunder. As pointed out heretofore, the board having acted and completed its duties and the President having made his decision upon such recommendations of such special board, and such decision having been acted upon to a greater or less extent by the officers in charge of the project, it would seem that the project covered by the act *has now become fixed and definite* with no power of modification or change, except as provided in the project itself, by any authority save the Congress. \* \* \*

"For the above reasons, I am of the opinion that the project set forth in House Document No. 90, Seventieth Congress, first session, *is the legal project* to be executed in accordance with the law and that *this project is fixed and not subject to review or change by this administration.*" (House Com. Doc. No. 2, July 19, 1929, R. 127-129).

Clearly the District Court was in error in stating, and in acting upon the assumption, that: "It is clear, therefore, that the *Flood Control Act was only an enabling Act.*" (R. 360 vs. R. 129.)

"Immediately following the passage of the Flood Control Act of 1928, *work was begun* on the Jadwin Plan as one, unified, comprehensive project for the flood control of the alluvial valley of the Mississippi River, funds being available at the time; and the work has proceeded practically

without cessation since that time" (petitioner's chief expert Mathes, R. 244).

We therefore submit that this Court has already practically adjudicated that the taking of respondent's property was legally completed by January 10, 1929.

(4) On July 1, 1929, pursuant to the authority of the President's proclamation of January 10, 1929, petitioner's condemnation suit in the Boeuf Floodway was actually filed (R. 129); and

(5) On July 1, 1929, the Court issued an INJUNCTION prohibiting "all persons," including respondent, from interfering in any way with the *full possession of the United States* (R. 129-130); which suit was not dismissed, and which injunction was not dissolved, until December 18, 1934 (R. 130), *long after* respondent had filed her present action (R. 16).

(6) Petitioner, as a matter of law, assumed full control of the fuse plug levee as a spillway *essential* to the Jadwin Plan, thereby depriving respondent of her inherent right to defend her property against the flood waters of the Mississippi River by the Act itself (Doc. 90, Sec. 120, R. 124), the moment the Act became finally effective and operative as to the Boeuf Floodway on January 10, 1929 (Secs. 1 and 9 of the Act, R. 118-119), by the President's proclamation of approval of that date (R. 128).

(7) The actual construction work done by petitioner under authority of the 1928 Act had resulted in the Boeuf Floodway being actually in operative condition since approximately 1932. See Point III this brief.

Respondent, and other property owners in the Boeuf Floodway, for the past 6 years have lived under the con-

stant menace of the use of the floodway for destructive floods. As the Government has, month by month, increased the heights of the levees on the main river above and opposite respondent's property, has strengthened those levees, and has closed crevasses and natural outlets, so month by month has respondent's peril of flood increased. No man can tell when the flood will come (R. 172). It may come *any* year. *Each* year may be "*the flood year*" (R. 246). "Therefore be ye *always ready*." The dwellers in Boeuf Floodway live under *perpetual* condemnation. Therefore, who will buy their lands except at the pitiful, predatory, ghoulish prices of the looter and the gambler?

Only the providential and fortuitous fact that an unexpected cycle of droughts and low water has prevailed has heretofore prevented petitioner's actual use of the Boeuf Floodway. The twelve-year period, during which petitioner *guessed* in 1928 the floodway would be used, is rapidly drawing to a close. If the official estimate (Doc. 90, Sec. 119, R. 124) be correct, respondent's calamity is indeed impending. In justified anticipation of this catastrophe, for 6 years the market value of respondent's land has been destroyed, or disastrously diminished and impaired. Certainly to that extent respondent's "property" has been "taken."

"And when the implied promise to pay has once arisen, a later denial by the government (whether at the time of suit or otherwise) of its liability to make compensation *does not destroy the right in contract and convert the act into a tort.*" *Tempel v. United States*, 248 U. S. 121, 39 S. Ct. 56, 63 L. ed. 162, at p. 165.

"The property may be appropriated by an act of the Legislature. \* \* \* *Mississippi & R. R. Boom Co. v. Patterson*, 98 U. S. 403, 25 L. ed. 206.

"It may justifiably be assumed that the adoption by Congress of a plan of river flood control which involves an intentional, additional, occasional flooding of certain lands constitutes a taking thereof as soon as the government begins to carry out the project authorized,"—"as soon as work on the project is begun."

*Hurley v. Kincaid*, 285 U. S. 95, 52 S. Ct. 267, 76 L. ed. 637, 638.

*Danforth v. United States*, 102 F. (2d) 5, 10.

*In re: Mayor*, 58 N. Y. S. 58, 60.

*Louisville & N. R. Co. v. Lambert*, 33 Ky. L. R. 199, 110 S. W. 305, 307.

*Ft. Wayne & S. W. T. Co. v. Fort Wayne & W. R. Co.*, 170 Ind. 49, 53, 83 N. E. 665, 16 L. R. A. (N. S.) 537.

*Hampden, etc., Co. v. Springfield, etc., R. Co.*, 124 Mass. 118.

*In re: Department of Public Parks*, 6 N. Y. S. 750.

*People ex rel. Canavan v. Collis, Commissioner of Public Works*, 46 N. Y. S. 727, 728.

*Chelton Trust Co. v. Blankenburg*, 241 Pa. 395, 396, 88 Atl. 664, 665.

*In re: Philadelphia Parkway*, 250 Pa. 257, 95 Atl. 429, at pp. 430-431.

See Appendix E, this brief.

"While the owner is not to be disseized until compensation is provided, neither, on the other hand, when the public authorities have taken such steps as finally to settle upon the appropriation ought he to be left in a state of uncertainty, and compelled to wait for compensation until some future time, when they may see fit to use his land. The land should be either his or he should be paid for it. When



ever, therefore, the necessary steps have been taken on the part of the public to select the property to be taken, locate the public work and declare the appropriation, the owner becomes absolutely entitled to compensation, whether the public proceed at once to occupy the property or not. If a street is legally established over the land of an individual, he is entitled to demand payment of his damages, without waiting for the street to be opened." *Cooley's Const. Lim.*, (7th ed.) p. 818.

"Granting the compensation here to be, what it certainly is, the price of a *perpetual easement*, it is impossible to imagine a title to it in a subsequent grantee of the land subject to the easement.

"And in *McFadden v. Johnson*, 72 Pa. 336, 13 Am. Rep. 681, the same court held that the damages to land, occasioned by the construction of a railroad, were a *personal claim by the owner when the injury occurred*—that they *did not run with the land, nor pass by a deed, though not reserved*.

"Numerous authorities to the same effect may be found collected in *Wood on Railroads*, vol. 2, p. 994; and the conclusion established by the decisions is there said to be that *the damages belong to the owner at the time of the taking*, and do not pass to a grantee of the land under a deed made subsequent to that time, unless expressly conveyed therein.

"So, too, it has been frequently held that if a landowner, knowing that a railroad company has entered upon his land and is *engaged in constructing its road without having complied with the statute*, requiring either payment by agreement or proceedings to condemn, remains inactive and permits them to go on and expend large sums in the

work, he will be estopped from maintaining either trespass or ejectment for the entry, and will be regarded as having acquiesced therein, and be restricted to a suit for damages. *Lexington & O. R. Co. v. Ormsby*, 7 Dana, 277; *Harlow v. Marquette, H. & O. R. Co.*, 41 Mich. 366; *Cairo & F. R. Co. v. Turner*, 31 Ark. 494, 25 Am. Rep. 564; *Pettibone v. La Crosse & M. R. Co.*, 14 Wis. 443; *Chicago & A. R. Co. v. Goodwin*, 111 Ill. 282, 53 Am. Rep. 622."

*Roberts v. N. P. R. R. Co.*, 158 U. S. 1; 15 S. Ct. 756, 39 L. ed. 873, at pp. 876, 877.

These authorities make it clear that the compensation is to be awarded to the owner at the time of the taking, respondent Mrs. Sponenbarger; that any subsequent purchaser must take subject to the easement heretofore acquired by the United States, the loss in value to be forever borne by respondent Mrs. Sponenbarger; and that a perpetual easement was impressed on the land for floodway purposes, and respondent's property was thus "taken," January 10, 1929.

**C. ACTUAL INVASION.** For lack of any better defense, counsel for petitioner have argued strenuously at every opportunity that there has been no taking of respondent's property because there has been no physical invasion of her land by the actual flooding of the Boeuf Floodway. Counsel argue that unless there has been an actual physical destruction of the corpus of physical property there can be no "taking" within the meaning of the Fifth Amendment. In fact, this is the *only defense* tendered by petitioner in this case. All else which has been offered goes *only* to an attempted *mitigation of damages*. This is all irrelevant, immaterial, incompetent, beside the point, misleading and confusing.

The District Court held: "The plaintiff is not entitled to claim damages, if any, until, if and when said fuse plug actually operates and places additional flood waters over and across plaintiff's land" (R. 370, Par. 8); "before the plaintiff in the instant case can recover, she must show that there has been an actual invasion of her *land* amounting to an ouster and *overflow* of such permanent character as to imply an intention to take" (R. 373, Par. 18). See also opinion of District Court, R. 385-386.

The District Court *refused* to correctly declare the law as follows: "No actual, physical invasion is necessary to constitute a 'taking' in the constitutional sense. *Any* substantial interference with private property which destroys, or materially lessens its value, or by which the owner's right to its use and enjoyment is in any substantial degree abridged or destroyed, is a 'taking' even though the title and possession of the owner remain undisturbed, and there is no actual, physical invasion of the property. Property is 'taken' when any of its proprietary rights are taken, of which property consists. That there may be a taking of property without actual physical invasion of it has often been held, and is a well established legal principle" (R. 340, Par. 20); and: "flooding of property is not a 'taking' where the property has already been acquired for, and dedicated to, that purpose. Therefore, if, as and when the petitioner's property is actually flooded or invaded for actual flowage by the United States, there can be no other or further recovery by the petitioner. Actual damages for physical invasion are not recoverable against the United States, and such damages are not properly an issue in the case at bar. (*Mullen Benevolent Corporation v. United*

*States*, 290 U. S. 89, 54 S. Ct. 38, 78 L. ed. 192)" (R. 341, Par. 32).

These are egregious errors (Assignments Nos. 8, 209, 229, 230, 236, 238, R. 99-113). The mind imbued with the apposite legal principles repeatedly announced and exemplified in the decisions reviewed in this brief cannot easily fall into such palpable error.

To suggest that respondent can recover damages after flooding (R. 370 and 373) is a cruel delusion. The record suggests that this is probably how petitioner's representatives treacherously snared the minds of their lay witnesses. Some of these witnesses were taken "on a boat in the Mississippi River, in the presence of certain Government Engineers and attorneys" (R. 228). After such schooling, these witnesses each based his testimony on a *fatally erroneous premise of fact*. How else, but by those who thus deceptively prepared petitioner's case, could their witness Farrell have been induced to base his testimony on the assured premise, *pitifully false*: "If the Government exercises its right to overflow my land, I expect \$100 an acre for damage to my cultivated land and \$25 for the wood land" (R. 225)? Only crass ignorance of the law, ingenious sophistry, or bold and malicious inconsistency can account for any such fallacy.

(1). *Physical Invasion Would Create No Right of Action*. This Court well knows, as a matter of law, that the United States is not responsible for any such damages. The Tucker Act authorizes the filing of no such claim in tort. If respondent had waited until her land was actually flooded and then filed suit, her action would be promptly dismissed on demurrer because (a) barred by limitation

and (b) non-liability of the Government for any such damage. Then respondent would be hopelessly and forever lost.

"It is a fundamental principle that no *damages* lie against either Federal or State Government" (Doc. 90, Sec. 32).

Section 3 of the Flood Control Act of May 15, 1928, expressly provides: "No liability of any kind shall attach to or rest upon the United States for *any damage* from or by floods or flood waters at any place." This language is clear, all inclusive, prohibitive, and mandatory. Furthermore, this is merely a statutory declaration of the pre-existing law. See *Cubbins v. Mississippi River Commission*, 241 U. S. 351, 36 S. Ct. 671, 60 L. ed. 1041; *Hughes v. United States*, 230 U. S. 24, 33 S. Ct. 1019, 57 L. ed. 1374; *Jackson v. United States*, 230 U. S. 1, 33 S. Ct. 1011, 57 L. ed. 1363.

In *Mullen Benevolent Corporation v. United States*, 63 Fed. (2d) 48, 56; the Court emphatically and correctly declares: "*Flooding the property was not a taking where the property was already acquired for and dedicated to that purpose.*" How promptly would petitioner confront respondent with that principle of law should she wait until her land had actually been flooded, being chargeable all the time with full knowledge that as a matter of fact and law her land had already *long since* been "dedicated to that purpose" by the Flood Control Act of May 15, 1928! How cruel and indefensible for Government counsel and engineers to persuade property owners not to sue for damages until their lands and personal possessions have been physically destroyed by flood waters, and then, when such dis-



treassing exigency has occurred, gloatingly confront the property owner with the utter futility of suing the Government for such physical damages after they have occurred.

In the present action, respondent does not seek to recover *damages* in violation of the legal principles just referred to, but, by authority of the Fifth Amendment and the Tucker Act, she does seek to recover compensation for a "*TAKING*" of certain of her property rights. The *invasion* for which respondent seeks recovery is the direct invasion of her *property right* of *exclusive* use and *unrestricted* dominion. Petitioner, by authority of the Flood Control Act of May 15, 1928, having heretofore taken the *right* to use respondent's land as a part of the floor of the Boeuf Floodway, for its later actual use by the Government at any time, as intended, there certainly can be no different nor additional recovery. Respondents remedy is *NOW*, or not at all.

(2) If respondent were in error as to this point, then indeed would petitioner be faced with results both disastrous and calamitous to it. Were it held that the Government is liable for all actual flood damages hereafter sustained, this indeed would be signing a blank check on the treasury of the United States. After each flood, while public consciousness was sensitive, sympathetic and responsive, there would doubtless result an immediate raid on the public treasury for an unlimited and unconscionable amount of alleged damages.

(3) But such is not the law. To prevent this very possibility the Congress expressly declared in Section 4 of the 1928 Act:

"The United States *SHALL* provide *flowage rights* for additional destructive flood waters that will pass by reason of *diversions from the main channel of the Mississippi River.*"

When read in connection with section 3, does this not clearly mean that the United States disclaims liability for damages but *admits liability* for the *taking* of the *right* to divert waters from the main channel of the Mississippi River over respondent's property on the floor of this diversion channel—the Boeuf Floodway? The United States *takes an easement* for a definite purpose which constitutes a *servitude* on respondent's property. It is for this *servitude* that petitioner must pay now. Its right has *now* been taken. It is of no concern to respondent whether or not the United States *ever actually uses* this easement which it has thus acquired. The *right to use* her property has been taken under the sovereign power of eminent domain by proper legislation, and *this* is what has practically destroyed the market value of respondent's land. It is *NOW* subject to petitioner's use at all times.

Then, how foreign to both fact and law is the erroneous Finding of the District Court:

"The property of plaintiff and those similarly situated is not subjected to any additional servitude from excessive flood waters than existed prior to the passage of the Flood Control Act of May 15, 1928" (R. 365, Finding of Fact No. 44).

If respondent's title has not been seriously affected, why did Congress enact Section 4 of the Flood Control Act of May 15, 1928? Certainly not to authorize the payment of physical damages which is prohibited in Section 3. Why

was the Overton Bill passed June 15, 1936 (Public-678; 33 U.S.C.A., Secs. 702a-10), recognizing the right of the property owners to compensation *before the use of the floodway?* Clearly petitioner's contention anent *physical invasion* and actual, *tangible damages* is not compatible with the mind of Congress, nor the facts in the case.

Both the 1928 Act and the 1936 Act recognize the legal fact that the United States *IS* responsible for the depreciation in land values on the floor of the authorized floodways. Existing undisputed physical facts and innumerable official Public Documents, cited in this brief, both justify and enforce the "*fear*" on the part of the public which has destroyed the *marketability* of respondent's land, squarely within the doctrine announced in *Portsmouth Harbor Land & Hotel Company v. United States*, 260 U. S. 327, 43 S. Ct. 135, 67 L. ed. 287, at p. 289.

If petitioner is correct in its position that respondent has *not yet* been damaged by the taking of her property, then the Congress certainly betrayed the American people, two years after respondent's suit was filed, by authorizing an appropriation of \$20,000,000 to compensate property owners for flowage rights in a similar floodway, in either of which respondent's property is included at the very head thereof. See Sec. 12, Flood Control Act of June 15, 1936, Public No. 678, 74th Congress, the Overton Act making the Markham Plan optional. This authorized compensation is approximately 80% of the market value of the lands in the floodway before the taking (R. 146-147). In fact the Flood Control Act of June 15, 1936, repudiates and refutes the entire theory of the defense presented in the instant case, viz., that respondent has suffered no damage from having her land dedicated as a part of the floor of a floodway

for the Mississippi River designed to carry a volume of water six times that which flows over Niagara Falls. This 1936 Act authorizes the appropriation of \$272,000,000, in addition to the \$325,000,000 authorized by the 1928 Act, based on the definite assumption that the fuse plug levee below the mouth of the Arkansas River will be, and *must be*, kept at the 1914 grade. Chief of Engineers Jadwin said the fuse plug *must* be left at the 1914 grade and section if the flood control plan for the whole alluvial valley is to function. Congress has invested more than \$600,000,000 on the assumption that it would work, and that the fuse plug levee would be *kept* at the 1914 grade. This is now all past history. The servitude on respondent's property is now complete as a physical fact. The enormous flood which inundated the State of Mississippi in 1927 *must now* be diverted over respondent's land under similar circumstances. Respondent lost her market value *years ago*. No future speculation is involved. This loss was caused by things which have *already* happened in the past. Respondent seeks no recovery in advance, but rather compensation for a loss long since sustained by the subjection of her property to a servitude *years ago*.

IF the flooding of respondent's land in the future by waters that overtop and crevasse the fuse plug would not be a taking, and the *right already acquired* to so flood the land is not a taking, it obviously follows that respondent's "property" can *never* be taken. If so, when? What further physical construction can the Government do to perfect that right than has already been done?

Every member of the Congress who spoke on the Bill understood that the passage of the Flood Control Act of

May 15, 1928, would result in a "taking" of property on the floor of the floodways. See Point V, B, 2 of this brief.

(4) *Decisions.* Respondent's position is by no means novel.

"That there may be a taking of property without actual physical invasion of it has often been held."

*Arkansas Highway Commission v. Kincannon*, 193 Ark. 450, at p. 452, 100 S. W. (2d) 969.

*City of Big Rapids v. Big Rapids F. M. Co.*, 210 Mich. 158, 174, 177 N. W. 284, 289.

*Buchanan v. Warley*, 245 U. S. 60, 38 S. Ct. 16, 62 L. ed. 149, 163.

*Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U. S. 327, 43 S. Ct. 135, 67 L. ed. 287.

*Richards v. Washington Terminal Co.*, 233 U. S. 546; 34 S. Ct. 654, 58 L. ed. 1088.

*Forster v. Scott*, 136 N. Y. 577, 32 N. E. 976, 18 L. R. A. 543.

*Chappel v. United States*, 34 Fed. 673.

*School Corporation v. Heiney*, 178 Ind. 1, 98 N. E. 628, 43 L. R. A. (N. S.) 1023.

*In re: Jacobs*, 98 N. Y. 98.

*Stockdale v. Rio Grande W. R. Co.*, 28 Utah 201, 77 Pac. 849-852.

*St. Louis v. Hill*, 116 Mo. 527, 22 S. W. 861, 21 L. R. A. 226.

*People v. Murphy*, 113 N. Y. S. 855.

*Thompson v. Androscoggin River Imp. Co.*, 54 N. H. 545.

*Old Colony, etc., R. Co. v. County of Plymouth*, 14 Gray 155.

*Webster County v. Lutz*, 234 Ky. 618, 28 S. W. (2d) 966.

*Hot Springs R. R. Co. v. Williamson*, 45 Ark. 429, affirmed 136 U. S. 121, 10 S. Ct. 955, 34 L. ed. 355.

"It is a transparent fallacy to say that this is not a taking of his property, because the land itself is not taken,



and he utterly excluded from it, and because the title, nominally, still remains in him, and he is merely deprived of its beneficial use, which is not the property, but simply an incident of property. Such a proposition, though in some instances something very like it has been sanctioned by courts, *cannot be rendered sound, nor even respectable*, by the authority of great names. Of what does property practically consist, but of the incidents which the law has recognized as attached to the title, or *right of property*?" *Grand Rapids Booming Co. v. Jarvis*, 30 Mich. 308, at p. 321.

"The 'taking for public use,' when applied to land, is *not limited to occupation by the public*. Any regulation, which imposes a restriction on the use of the property by its owners, and any neighboring public improvement which tends to impair the enjoyment of property, by affecting some right or *easement* appurtenant thereto, may constitute a public use within the meaning of the Constitution" Re: *Kansas City Ordinance*, 298 Mo. 569, 593, 252 S. W. 404, 408.

"*Anything which destroys or subverts the exclusive right of any person to freely use, enjoy, and dispose of any determinate object, real or personal, constitutes a taking or destruction pro tanto of property, notwithstanding the possession and disposal thereof is not disturbed, and there is no actual or physical invasion of the locus in quo.*" *Prairie Pipe Line Co. v. Shipp*, 305 Mo. 663, 672, 267 S. W. 647.

"*There need not be an actual, physical taking, but any destruction, restriction, or interruption of the common and necessary use and enjoyment of property in a law-*

ful manner may constitute a taking for which compensation must be made to the owner of the property. \* \* \* The term 'taking' should not be limited to the absolute conversion of property; *nor is it material whether the property is removed from the possession of the owner, or in any respect changes hands.*" 20 *Corpus Juris*, pp. 666-668, Sec. 138, and numerous cases cited in footnotes there found.

In an almost identical situation in another floodway as the result of the Flood Control Act of May 15, 1928, in the case of *United States v. Yazoo & M. V. Ry. Co.*, 4 Fed. Supp. 366, the Court correctly stated: "The fact that the existing gaps have not been closed, and that the main levee between the spillway and the river has not been cut, is of no material importance, considering the magnitude of the work. *For all practical purposes the spillway is, and has been since June, 1931, complete and ready for operation whenever the need therefor shall arise. The United States has acquired and taken every right needed for the spillway project, and the property of the respondent has to all intents and purposes been subjected to every possible use contemplated by the taking.*" \* \* \* These facts show a taking within the principles of law applicable and give rise to compensation in favor of the respondent."

In *Kincaid v. United States*, 37 Fed. (2d) 602, involving this identical Boeuf Floodway, as long ago as December 13, 1929, the Court correctly said:

"Of course, the physical occupancy of the ground in this case will not take place until and when it is overflowed by water in time of flood; but the process of subjecting it to that service, and the taking possession in so far as is either necessary or contemplated by the act, will begin with

the construction of the first levee or works which are intended to direct the water upon the land. No other character of possession seems reasonably to have been contemplated in any case where 'flowage rights' or rights-of-way, as distinguished from lands, were to be acquired, than that which flows from the construction of the works. When they will have been completed the appropriation will be complete. *It cannot be that, if the owner is entitled to compensation, he must wait until an overflow comes.* Under the law of this state unqualified ownership of property includes the *usus, fructus and abusus*, or the right to possess, enjoy the fruits, and dispose of the whole in the most unrestricted manner. \* \* \* When either of these is taken away or diminished, *to that extent does the owner lose a part of his property*, or, which is the same, the elements that constitute ownership." 37 Fed. (2d), at p. 608.

"It would be a very curious and unsatisfactory result, if \* \* \* it shall be held that if the Government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, *can inflict irreparable and permanent injury to any extent*, \* \* \* without making any compensation, because, in the narrowest sense of that word, it is not taken for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as these rights stood at the common law, instead of the government, and make it an authority for *the invasion of private right under the pretext of public good*, which had no warrant in the laws or practices of our ancestors." *Pumpelly v. Green Bay & Miss. Canal Co.*, 13 Wall. 166, 177-178, 20 L. ed. 557, 560; *Lewis, Eminent Domain*, (3d Ed.), p. 66.

Particularly pertinent are the remarks of the Court in *Louisville & N. R. Co. v. Lambert*, 33 Ky. L. R. 199, 110 S. W. 305, where a railroad company, pursuant to a city ordinance erected a wall in the street abutting on lots owned by the plaintiff. Plaintiff had sold two of the lots *before the completion of the wall*. It was contended that the right to recover was in the purchaser of the lots, and not the plaintiff, because he had parted with his title before the wall had been completed. The Court rejected this contention, saying:

"In this case appellant (railroad company) not only had the right to construct the wall, but *was actually engaged in its construction at the time a portion of the property was sold*. The work had progressed to such an extent as to make the construction of the wall reasonably certain. While the injury to the two lots first sold was not complete, the effect was practically the same, and *every person desiring to purchase the lots in question had the right to assume, and did assume, that the wall would be completed*, and as a matter of fact it was completed. The appellee being the owner of the lots when thus injured, we think he was entitled to recover such damages as his property sustained. . . . If the purchaser of the property had brought suit to recover, the *conclusive answer* would have been that *the property had been permanently damaged in its market value*, if damaged at all, at the time of the purchase. *He bought the property at a reduced price*. He was not damaged, because he got the advantage of the reduction in the price. Who, then, suffered the damage? Manifestly the appellee who sold the property, ~~for~~ on account of the construction of the wall, he sold it for less than he could have got for it before it was generally known that the wall would be constructed." 110 S. W. 307.

So in the case at bar respondent had the perfect legal right to take advantage of the peak prices during the boom elsewhere of 1929, but she was deprived of that right by the Flood Control Act of May 15, 1928, followed by the actual construction of the project which was so far in active progress during the year 1929 as to *then* destroy the market value of respondent's property. Every person desiring to purchase respondent's property *then* had the right to assume, and did assume, that the floodway would be completed, and as a matter of fact it was completed for all practical purposes. Therefore respondent *sustained her actual loss in 1929*. So far as the market value of her property was concerned the taking by the Government was complete in 1929. Therefore respondent's present cause of action was complete in 1929. *Nothing which happened thereafter could destroy that complete cause of action which is now being enforced.*

This all demonstrates that whether or not respondent's property has actually been flooded, or has actually suffered physical invasion by the Government's use of the floodway, is wholly immaterial. She never can recover for any physical damage which results from such actual, physical use of the floodway. There ~~never~~ was a time when she could have recovered for such damages. She seeks no such recovery in the case at bar. She seeks only compensation for a "taking" under the provisions of the Fifth Amendment of the Federal Constitution. Therefore, any evidence of, or reference to, actual physical invasion of respondent's property, *or, the lack thereof*, is entirely beside the point, incompetent, irrelevant and immaterial, tending only to confuse the issue to be adjudicated by this Court. Any argument to the contrary discloses a complete failure to



apprehend the meaning of the word "property" as it is used in the Fifth Amendment.

A practical illustration would be this: Suppose there were enacted in the City of Washington a congressional ordinance authorizing the erection of a *glue factory* in the midst of the most exclusive residential section of Washington, D. C., adorned with the finest homes of the city, occupied by the most fastidious, select citizens. Pursuant to such ordinance, the glue factory is erected, the machinery put in, and the materials assembled for starting the manufacture of glue. These expensive, exclusive homes would immediately lose their market value *before*, and *not after*, the factory actually begins operation. So it is with respondent's property in the case at bar even to a far more serious extent. Respondent rightly seeks to recover that *past* loss of market value which she long ago sustained—a right guaranteed to her by the Constitution of her country.

It is therefore perfectly clear that counsel for petitioner are discussing issues entirely beside the point when they urge that there has not yet been any "physical invasion" because the respondent has not yet been actually drowned by flood waters from the Mississippi River diverted by the Flood Control Act over her land in the Boeuf Basin floodway. They ignore the vital fact that the very fixing and dedication of this floodway by the Government under the terms of the Flood Control Act has invaded certain constituent elements of the respondent's *property*, viz, her UNRESTRICTED right of use, enjoyment and disposal. *Anything* which destroys or subverts any of the essential elements of property hereinbefore mentioned is a "TAK-

ING," or destruction *pro tanto* of respondent's property, though the possession and power of disposal of the land (at its diminished value) remain undisturbed, and "though there be no actual or physical invasion of the locus in quo."

**D. CONSEQUENTIAL DAMAGES.** Petitioner has unsuccessfully attempted to defend every case of "taking" since the early case of *Pampelly v. Green Bay & Miss. Canal Co.*, 13 Wall. 166, 20 L. ed. 557, by pleading that the rights destroyed were merely *consequential damages* for which there can be no recovery. This is the easy way out. There was nothing neoteric in the re-echoing of this sing-song defense when the District Court was induced to erroneously declare: "If the passage of the Flood Control Act creating a general plan of flood control had any depressing effect whatever upon the market value of plaintiff's land, and lands similarly situated, that in itself did not constitute such a damage for which the United States was liable, but if such damage did exist it was of a *consequential* and anticipatory and speculative nature and is *damnum absque injuria* for which the United States is not liable" (R. 373, Par. 17). In its opinion, the District Court stated: "Action on the part of the Government, not directly encroaching upon private property, but which imposes a temporary, occasional or incidental injury, and impairs its use is regarded as a *consequential damage* and does not amount to a taking" (R. 386). The District Court would have been more nearly correct had it added to this statement: Provided such damages were *unintentional* and *not contemplated* by the authorized project.

*Recent authorities* have forever and effectively laid this ghost of "consequential damages"; though the cor-

rect definition and legal concept of the term can be found easily enough in the older decisions. Briefly, consequential damages is an *unexpected damage*, resulting from an act which was *not reasonably contemplated nor intended* by the parties. No informed person will say that respondent's damage was unexpected, unintended, or not contemplated. See Point V, B, 2 hereinbefore.

Consequential damages are usually such as can be avoided by extra expense, warding off the consequences of the act complained of. The very phrase is really self-explanatory. Webster's New International Dictionary defines the term "consequential damages" as being at law: "Those damages which do not arise as an *immediate* or *natural* and *probable* result of the act of the party, but as an incidental result of it. Such damages, as being remote, are generally not recoverable; but *sometimes they may be recovered, as in case of special damages or special statutory provisions.*"

But again, we remind the Court that respondent is not suing to recover any kind of a *damage*, consequential or otherwise. She sues to recover for an actual *loss* of market value resulting from a *taking* of her property, which loss is judicially measured by the difference between the value of her entire property before and after such taking. See Point XI, 3, this brief.

The test as to whether damages are the result of "a taking" of property, for which the United States is liable, or are merely "consequential"—unintentional, unanticipated, not contemplated at the time, incidental and remote, temporary—for which the Government is not liable, is well stated by the Supreme Court in *Manigault v. Springs*,

199 U. S. 473, 26 S. Ct. 127, 50 L. ed. 274, 280, as follows:

"We think *the rule* to be gathered from these cases is that where there is a practical destruction or *material impairment of the value of plaintiff's lands*, there is a taking which demands compensation; but otherwise where, as in this case, plaintiff is *merely put to some extra expense in warding off the consequences of the overflow.*"

By no expense, reasonable or unreasonable, can respondent ward off from her property the consequences of the Flood Control Act. It is a *permanent* condition, or so was considered May 15, 1928, at the time of the taking when compensation was due. The Government floodway has rendered the homes of the property owners therein "unfit for a place of residence" (R. 181). This constitutes "a taking," not a mere incidental damage which can be easily corrected by some expenditure of a reasonable amount of money. *Pennsylvania R. R. Co. v. Angel*, 41 N. J. E. 316, 7 Atl. 432.

The distinction between "consequential damages" and "a taking" is also very clearly and convincingly discussed in the case of *Thompson v. Androscoggin River Imp. Co.*, 54 N. H. 545. In the course of the opinion the Court says: "A damage caused by a breach of contract is often called *consequential* (in the technical sense of being a consequence so remote or unexpected, as not to entitle the sufferer to redress) *when it cannot be reasonably supposed to have been contemplated by the parties*, in making the contract, as likely to be caused by a breach; and in tort, a damage is often called consequential *when it was not a reasonably necessary consequence*, or one so natural and probable that the defendant can be reasonably supposed to have foreseen the likelihood of its being caused by the wrong complained

of. Eaton's damage was not consequential in that sense, for it was reasonably to be expected as a natural consequence of making the cut where it was and as deep as it was, however carefully and skillfully the work might be done, and was equally to be expected whether the cut were made by R. or by the defendants." 54 N. H. 555.

There can be no doubt but that respondent's loss was not only "reasonably to be expected," but was definitely foreseen. The late Judge Martineau, while Governor of Arkansas, testified before the Senate Committee on Commerce relative to the land on the floor of the Boeuf Floodway: "Every man who owns land in these flowage ways recognizes that when it (his land) is placed where it is constantly subjected to an overflow without any protection, that its value, at least for agricultural purposes, is destroyed." (Senate HEARINGS, Flood Control, January 28, 1928, p. 206). There is nothing merely incidental, unanticipated, unintentional, temporary or remotely consequential about the condition of respondent's land caused by the Jadwin Plan.

The rule in the Eighth Circuit has recently been clarified in the following language: "Ordinarily, 'consequential damages' are those which do not arise as an immediate, natural, and probable result of the act done, but arise from the interposition of an additional cause, without which the act done would have produced no harmful result; while 'proximate damages' are those which accrue directly and in natural sequence, and as a specific (hurtful) result from the act done, without the intervention of an independent cause.

"It is not necessary to consider, or rule, whether the damages dealt with in the cases of *Christman v. United*



*States*, (C.C.A.) 74 F. (2d) 112; *Jackson v. United States*, 230 U. S. 1, 33 S. Ct. 1011, 57 L. ed. 1363, and *Sanguinetti v. United States*, 264 U. S. 146, 44 S. Ct. 264, 68 L. ed. 608, do or do not fall precisely within the fairly well-settled definition of consequential damages, for there were in each of these cases, as will be noted in the course of the discussion, so many other questions, which may have been controlling, that the precise nature of the hurt therein is well-nigh irrelevant. But obviously, confusion is found in the cases, and this confusion has seemingly misled learned counsel for appellant. This confusion comes, we think, from a failure to distinguish as to the origin of the independent cause. If the latter arises from the act of another person and so could have been obviated or prevented, or from natural causes acting abnormally, e. g., acts of God, damages arising from the original act are not recoverable, for they are consequential merely, and not proximate. But if the hurtful result shall arise from the original act done, perforce, or plus the normal operation of well-known, uncontrollable and immutable laws of physics and natural forces, we are incapable of either following or agreeing to the distinction.

"It is known that the wind blows; that in certain latitudes and at a certain temperature ice forms, and later melts when the temperature rises; that water will saturate and soften the soil; that flowing streams carry silt, the amounts whereof vary as the square of the velocity, and when the velocity decreases the silt is deposited on the bed of the stream. None of these things was due to the act of any person, nor can any of them be prevented by any reasonable human means. It is merely nature acting as it always has, and always will act. It seems to us that WHEN

**A GIVEN ACT IS SUCH AS TO PUT IN FORCE A NORMAL LAW OF NATURE, WHICH IN CONJUNCTION WITH THE ORIGINAL ACT DONE, PRODUCES A HARMFUL RESULT, SUCH RESULT IS NECESSARILY A PROXIMATE CAUSE OF THE ACT DONE.**

If this is not so, it is difficult to envision any instance of proximate cause; for man does nothing, he has never done anything, nor will he ever do anything, except *move physical objects and then permit nature to take its course*. If these things were not in contemplation of the dam builder, how can it be said then that the dam caused the pool. Man made the pool but nature filled it with water, because nature makes water run downhill, and pile up when it meets an obstacle to its downward flow." *United States v. Chicago, B. & Q. R. Co.*, 82 Fed. (2d) 131, at pp. 136-137, 106 A. L. R. 942.

All of the authorities herein cited on the question of "taking" completely refute this theory that escape from liability lies in the confusing plea of consequential damages. The cry of "consequential damages" in this case misses the mark entirely. It is significant only as being the hackneyed distress call of helplessness and a fatal admission of weak defenselessness.

"When the 5th Amendment of the Constitution of the United States declares that: 'Private property shall not be *taken* for public use without just compensation' a compact or contract of the highest degree of obligation is thereby established between the American people of the one part and each and every citizen of the other part. In and by that constitutional provision every citizen agrees that his property may be taken for public use whenever

the nation, through its legislative department, demands it; and the United States agree that, *when the property of the citizen is so taken, just compensation shall be made.*" Mr. Justice Shiras in *Hill v. United States*, 149 U. S. 593, 600, 13 S. Ct. 1011, 37 L. ed. 862, at p. 864.

The Circuit Court of Appeals was entirely right in ignoring this specious contention of petitioner's perplexed counsel anent "consequential damages."

**E. STATUTE OF LIMITATION.** No statute of limitations is involved in the instant case, and would not be mentioned but for the fact that counsel for petitioner threaten the Court with dire disaster to the Government should respondent succeed in securing justice for herself in this action. In their Petition for Certiorari (pp. 23-24) counsel state: "The present proceeding is a test case to determine whether the United States had 'taken' the lands located in the Boeuf floodway. It is highly important, therefore, that the correct result be reached, since that floodway is over 125 miles long and about 15 miles wide."

We concede that it is highly important that a correct result be reached, but this would be true even if respondent's little 40 acres of land alone was involved. The protection of the constitutional rights of America's humblest citizen is indeed of supreme importance to the Nation. The fact that the floodway may be over 125 miles long and about 15 miles wide is wholly immaterial, and throws no light whatever upon the legal rights of the respondent now submitted to this Court for adjudication.

Nevertheless, it is only fair to call the Court's attention to the fact that with the exception of the few small

suits still pending in the District Court and the comparatively few cases which were filed in time in the Court of Claims (R. 217-219 Petition for Certiorari, this case, p. 24), all other property owners in the Boeuf Floodway are now barred from suits against the United States under the Tucker Act. The witness Mr. Hopson was correct in testifying: "I think such claims are now barred by the statute of limitation" (R. 191).

"No suit against the Government of the United States shall be allowed under this paragraph unless the same shall have been brought *within six years after the right accrued* for which the claim is made." (Tucker Act, Title 28, U.S.C.A., Sec. 41 (20), p. 626.)

Therefore, no new suit can now be successfully filed against the United States because of the taking of the Boeuf Floodway; and this has been true since January 10, 1935, six years after the original taking on January 10, 1929. See Point V, B. 4, d, of this brief.

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## POINT VI.

***Boeuf Spillway Has NOT Been Abandoned.***

The most inexplicable error of the District Court is its startling assertion that not only did "the Government not proceed with the construction of the Boeuf Floodway" (R. 380), and "consequently, that floodway is not now and never has been in an operative condition" (R. 388), but, on the contrary, *the Boeuf Spillway has been abandoned* (R. 371, Par. 11; R. 361, Par. 31; R. 358, Par. 26). With equal truth, we very respectfully submit, it may be calmly asserted that the sun has ceased to shine.

The District Court erred in refusing respondent's requested Conclusion of Law which correctly declares: "The Flood Control Act of June 15, 1936, has no effect upon the petitioner's cause of action; except that section 2 of said Act is an express admission by the United States that the Boeuf Floodway is in operative condition, and that the United States will continue to hold its right to flood petitioner's property for an indefinite period of time in the future as contemplated by the Flood Control Act of May 15, 1928. Section 2 of the Flood Control Act of June 15, 1936, is a ratification and confirmation of the taking of petitioner's property as is alleged in this action" (R. 347, Par. 51). See R. 85-86.

1. In the first place, all testimony relative to the proposed Markham Plan of the Flood Control Act of June 15, 1936, was *incompetent*, and the District Court erred in the admission of this testimony (R. 239-240 and 287). Respondent's property was taken January 10, 1929, or very soon thereafter. Respondent's cause of action had then



accrued. Respondent was *then* constitutionally entitled to the value of the servitude or easement taken paid *contemporaneously* in money. No fact or element resulting subsequent to this taking can be legally considered. *Olson v. United States*, 292 U. S. 246, 54 S. Ct. 704, 78 L. ed. 1236, 1237, 1245, and cases there cited. No fact or event not in existence at the time of the taking could have possibly been contemplated by the parties. Any such unforeseen, unanticipated contingency would be of the consequential nature of which the Courts take no note. This cause must be tried as of the day of the taking, or certainly not later than as of the date the suit was filed on August 11, 1934 (R. 16).

When respondent's land was taken she was *immediately* due compensation by the Government. Any later change in attitude by the Government would be wholly ineffective to destroy respondent's right of action which had accrued at the time of the taking. The records of the Court of Claims are full of decisions at the conclusion of the World War illustrating this point. The United States was uniformly required to pay compensation for property taken *but abandoned without use* at the conclusion of the war. The failure of the Government to use the property so taken was of no concern to the owner whose property had been taken. So here.

2. *The Facts.* But all such discussion in the case at bar is purely academic. THE BOEUF FLOODWAY HAS NOT IN FACT BEEN ABANDONED. Everyone familiar with the facts knows better. There is actually at present no substantial market value for property on the floor of this floodway because of the inescapable physical

fact that the Boeuf Spillway (the fuse plug levee) is still ready for use at any time it is needed under the Jadwin Plan, and has been so ready for many years. There is no assurance that this situation will ever be changed.

The Congress of the United States is perfectly frank about the matter. *Long after* the filing of respondent's suit, the Congress expressly admitted the Government's easement and asserted its right to flood respondent's property at will under the provisions of the 1928 Act, and definitely declared the intention of the United States to continue that use indefinitely. Section 2 of the Flood Control Act of June 15, 1936, reads as follows:

"Sec. 2. That the Boeuf Floodway, authorized by the provisions adopted in the Flood Control Act of May 15, 1928, shall be abandoned, *as soon as the Eudora Floodway, provided for in Flood Control Committee Document Numbered 1, Seventy-fourth Congress, first session, is in operative condition and the back-protection levee recommended in said document, extending north from the head of the Eudora Floodway, shall have been constructed*" (R. 154).

The words "*shall be . . . as soon as . . . shall have been constructed*" refer to the future. Congress does not pretend to say that the Boeuf Floodway has as yet been abandoned. As a physical fact the Boeuf Floodway cannot be abandoned until a physical levee has been constructed across its mouth which will be respected by the violent flood waters of the Mississippi River. The Boeuf Floodway cannot be abandoned by a mere edict of Congress any more than old King Canute could stop the flood tides of the ocean on the beach by mere command. The Congress of the United States has undertaken no such fool-

ish and dishonest escape from liability in the present action. On the contrary, the United States is admitting, definitely, expressly and explicitly, by the language of section 2 of the Flood Control Act of June 15, 1936, that *the Boeuf Floodway is now in operative condition as intended* (see Point III), and will continue in such operative condition until the Eudora Floodway has been constructed, and until the mouth of the Boeuf Floodway has been physically closed by the back-protection levee recommended.

Even if that construction work should ever begin it would take many years for completion. As a matter of fact, *no informed person now expects the Eudora Floodway as authorized by the Flood Control Act of June 15, 1936, ever to be constructed.* In view, then, of section 2 above quoted, by what authority can anyone say that the Boeuf Floodway has been abandoned? Who abandoned it? How was it abandoned? When was it abandoned?

Judge Cooley once said: "Courts would justly be the subject of ridicule if they should deliberately shut their eyes to the sources of information which the rest of the world relies upon." *Heard v. Farmers Bank of Hardy*, 174 Ark. 194, at p. 206, 295 S. W. 38.

Even while this case was pending in the Circuit Court of Appeals the press of the country carried in bold headlines announcement that the **EUDORA FLOODWAY HAS BEEN ABANDONED.** The Flood Control Act of June 15, 1936, was not to become operative as to the Eudora Floodway, and the north extension involving respondent's property (the Markham Plan), unless and until 75% of the necessary flowage rights for *all the floodways* could be

acquired by voluntary purchase for not exceeding \$20,000,000 (Sec. 12; R. 154-155). This *condition precedent* has not occurred, and at Hearings before the Senate Commerce Subcommittee in Washington on March 28, 1938, and the House Flood Control Committee on March 30, 1938, it was admitted by all witnesses that the Secretary of War can *never* comply with this condition precedent. **THE EUDORA FLOODWAY IS DEAD.** It now appears that the *Boeuf Floodway* may *live forever*. At least that is the present situation; and certainly there was no suggestion to the contrary when respondent's suit was filed. The "Markham Plan" had not then even been conceived.

On March 30, 1938, Maj. Gen. Schley, the present Chief of Engineers, testified: "The engineering plans for the lower Mississippi heretofore recommended and adopted are fundamentally sound. \* \* \* *The provision for the escape of extraordinary flood waters into floodways is necessary.* The desirability of not having dwellings in floodways has already been demonstrated, which points to the need for authority to obtain some lands in fee. Due to a number of *insurmountable conditions*, it has *not been possible* for the department to initiate the construction of either the Morganza or *Eudora floodways.*" \* \* \* *The fuse plug levee was left at its lower height for the purpose of blowing if you had a flood in excess of the present levee capacity of the main river.* "That was the original purpose and goes back as far as the report of 1928, the Jadwin report. *That still remains with its original function.* There has really been *no change* with respect to that until the Eudora Floodway should be constructed." (HEARINGS, House Committee on Flood Control, March 30, 1938, at pp. 6, 9, 10, 17, 18 and 20).

When the fuse plug levee shall have been built up to the 1928 grade and section, equal in height, size and strength to the levees on the opposite side of the river, or when such a levee is in physical existence across the entire mouth or entrance of the Boeuf Floodway, thus effectually closing that mouth against diversions from the main channel of the Mississippi River, then, and **THEN ONLY** will the Boeuf Floodway be, in fact, abandoned.

In irreconcilable conflict with their superior officers and the composite official judgment of the Corps of Engineers, the underling expert hired-hands produced by petitioner to testify in the District Court gave it as their personal opinion (R. 251, 262), that the fuse plug levee could have easily carried a combination of the 1937 flood out of the Ohio River and the 1927 flood out of the Arkansas and White Rivers (Mathes, R. 245). The falsity of this conclusion is easily demonstrated with mathematical precision by using their own figures. Forgetting for the moment that a synchronization of known record floods at the mouth of the Arkansas River would aggregate 4,399,000 cubic second-feet of water (R. 162), we know that the crest discharge of the 1937 flood along the fuse plug levee was only 2,150,000 cubic feet per second, which left a free board above water along the fuse plug levee of only 4 feet (Morris, R. 254). The Mississippi River Commission insists there should always be a free-board of five (5) feet for safety. (HEARINGS, House Committee on Flood Control, March 30, 1938, at p. 55—Gen'l. Ferguson, President of Mississippi River Commission.)

"Approximately 2,000,000 cubic second-feet of water came out of the Ohio River to the mouth of the White and



Arkansas Rivers in 1937" (Mathes, R. 245). "When the crest of the 1937 flood reached the mouths of the Arkansas and White Rivers the discharge from those rivers was 100,000 cubic feet as compared with 1,200,000 cubic feet in 1927" (Clemens, R. 263). Thus a synchronization of the 1927 flood (1,200,000) and the 1937 flood (2,000,000) would have produced a total discharge of 3,200,000 cubic second-feet of water along the fuse plug levee (R. 245). As a matter of fact the total discharge in 1937 was only 2,150,000 (R. 254), or 1,050,000 cubic second-feet less than would have been true had a 1927 flood been coming out of the Arkansas River in 1937.

By actual measurement, as shown by the official discharge rating curve graph during the 1937 flood for each additional 52,000 cubic second-feet of water the gage was raised at Arkansas City 1 foot (R. 285, 279). Therefore, dividing this 1,050,000 c.s.f. by 52,000 proves mathematically that if a 1927 discharge from the Arkansas and White Rivers had been added to the 1937 discharge from the upper river at their mouths, the water along the fuse plug levee would have been more than 20 feet higher, or at least 16 feet above the top of the fuse plug levee. As is pointed out by Mr. Neptune: "In order for the fuse plug levee to have safely carried such a flood, with the customary freeboard, it must have been 17½ to 18½ feet higher than it now is" (R. 278).

No wonder these same Government witnesses were forced to admit the continued necessity of the floodway (R. 250) notwithstanding all their theoretical, speculative enthusiasm for the cut-offs. It is significant that not a single one of petitioner's witnesses dared advocate the

building up of the fuse plug levee to equal grade and section with the levees across the river in Mississippi and to the north and south of the fuse plug—the only physical fact which would give respondent equal protection with her neighbors. See R. 327-328, Par's. 83, 84.

It is no secret that for a number of years the Army Engineers have been waiting the outcome of this test suit (R. 217-219) before constructing the guide or protection levees limiting the floor of the Boeuf Floodway. The recommendation February 28, 1931, was: "that the construction of the side or protection levees in the Boeuf and Atchafalaya basins be *deferred, until the question of damages to lands and property* between these levees has been determined by the courts" (Doc. 798, p. 13, R. 138). "The protection levees are not at all essential to the proper functioning of the plan in the adopted project, but were included merely to furnish local protection or reclamation" (Doc. 798, p. 47, R. 139).

The Boeuf Floodway was definitely ratified in 1931. It was then recommended: "That *no change* be made in the project"—the Jadwin Plan (R. 140).

In 1931, the escape of flood waters through the Boeuf Basin was still "an essential feature of any economically feasible plan for the control of floods in the lower Mississippi Valley. The restriction of flow by means of side or protection levees in these basins is not essential to the escape of the flood waters but is advisable for the protection of certain lands, and for the protection of life and property, where the cost is not excessive" (Doc. 798, p. 26, R. 138).

In 1936, long *after* the filing of respondent's suit, Chief of Engineers Markham was still assuring the Congress of the United States that, notwithstanding all subsequent developments, the Boeuf Floodway was still *essential*. In answer to the direct question: "Can floods in the lower Mississippi Valley be controlled successfully without the construction of either the Boeuf or the Eudora Floodways?" General Markham answered emphatically: "*They cannot be*" (R. 148).

In 1938, even while this case was in the Circuit Court of Appeals, the present Chief of Engineers, Maj. Gen. Julian L. Schley, was still insisting to the Congress that a floodway south of the Arkansas River, to the west of the main channel of the Mississippi River, is an *engineering necessity*. He states definitely that something in the magnitude of a million cubic second-feet "*must* be diverted in that middle section if that area is to have security and protection" (HEARINGS before Senate Commerce Committee on S. 3354, March 28, 1938, p. 33). At the same time the President of the Mississippi River Commission, Brig. Gen. Harley B. Ferguson, concurred in the statement: "The engineers regard the construction of a diversion channel in the vicinity of the Boeuf as *still essential* for the protection of that territory" (Senate HEARINGS on S. 3354, March 28, 1938, p. 39). The Chief of Engineers further stated as true: "*As it now stands YOU HAVE the floodway authorized, and it is the controlling project now until the Eudora and Morganza Floodways are built*" (Senate HEARINGS on S. 3354, March 28, 1938, p. 28). "Last year our problem was *not to let more water into the lower river than it could carry*. Therefore, we have had to be *always ready to let the excess water above the river's*

*capacity escape at the low levee as authorized in the 1928 law*" (Gen. Ferguson, HEARINGS, March 28, 1938, p. 40).

Again may we ask *who* abandoned the Boeuf Floodway, and *when*? All public records on the point *definitely* and *expressly* refute the suggestion.

Both Gen. Schley and Gen. Ferguson then frankly admitted that it was improbable that the Eudora Floodway would ever be constructed. "*We have not been able to make much progress there.*" Over 60% of the property owners have refused to give options. "*There is no prospect of obtaining a sufficient number of options in the Eudora within the near future.*" We have "encountered a difficulty that looks like it is *insurmountable* in getting 75% of them." "*We cannot go into a State and do anything that is absolutely opposed by everybody you come in contact with.*" \* \* \* Some method of escape west of the river is necessary." (Senate HEARINGS, March 28, 1938, pp. 37, 38, 41, 45).

On March 22, 1939, *after* the decision of the Circuit Court of Appeals in this case, the Chief of Engineers still publicly admitted that no progress had been made on the Eudora Floodway. He said: "*With the single exception of the Eudora Floodway, noteworthy progress has been made on all important features of the comprehensive plan for the lower Mississippi River, including items added or affected by the 1936 and 1938 acts, and main river work has been performed where needed most*" (Congressional Record of March 22, 1939, Appendix, p. 4415).

After trying for a year to secure flowage rights on the floor of the proposed Eudora Floodway, all further

efforts on the part of the Army Engineers to secure options for these flowage rights in the Eudora were "suspended in May, 1938" (Report of the Chief of Engineers, U. S. Army, 1938, House Doc. No. 6, 76th Congress, 1st Session, Part 1, Vol. 2, at pp. 2016 and 2043).

Thus endeth petitioner's dream of the Eudora floodway.

"Not only is the Eudora Floodway not in operative condition, but its ultimate construction is now regarded as extremely doubtful, owing to apparently irreconcilable disagreements between the government and local authorities over the terms of acquiring flowage easements." *Sponenbarger v. United States*, 101 F. (2d) 506, at p. 512.

All the foregoing is strictly in accord with the official record in this case, which is of itself amply sufficient and conclusive to fully expose the basic error under discussion. The Markham Plan is a phantom that will never materialize for a defense in this case. (If ever constructed, the Markham Plan—the northern extension of the Eudora Floodway—would still cover respondent's land.)

"The Jadwin Plan as adopted by the Flood Control Act of 1928, has not yet been actually, physically changed. There has been no appropriation for the mere authorization of the Overton Bill. The plan of the Overton Bill (Markham Plan of the Act of June 15, 1936), cannot, by its own terms, become effective until flowage rights have been acquired within a definite limit and that has not yet been done. The only plan under actual construction is that authorized by the Flood Control Act of May 15, 1928. That is the actual, physical plan which is on the ground. (Petitioner's chief engineer expert, Mathes, R. 247.)



"This plan as described in sections 117 and 118 of Document 90 has not been changed, but is *still the plan at the present time.* \* \* \* The escape of flood waters through the Boeuf Basin is, and for a number of years has been, *an essential feature of this Jadwin Plan which is in operation*" (Mathes, R. 247-248).

"My interpretation of Section 2 of the Overton Bill (Flood Control Act of June 15, 1936) is *the Boeuf Floodway plan will still be in operation.* \* \* \* That stretch of low levee at the head of the Boeuf Floodway, designated as *a fuse plug, is to continue just as it has been left since 1928. There is no change to that section of the levee in the new law. It is left at the 1914 grade*" (petitioner's expert engineer witness Seybold, R. 258).

"*There has been no preparation to carry out the construction authorized by the Overton Bill. Very few flowage rights required by the Overton Bill have been acquired so far. The Markham Plan, authorized by the Overton Bill, is so far, nothing but a paper plan, an optional plan. I cannot say whether or not it will ever be executed. Even the details of the plan have not yet been worked out, much less approved by the higher authorities*" (Seybold, R. 258).

"*The Flood Control Act of June 15, 1936, the Overton Act authorizing the Markham Plan, leaves this fuse plug levee along the main channel of the river at the 1914 grade just as it is under the Jadwin Plan of the 1928 Act. It is not to be raised. The fuse plug is to be strengthened. \* \* \* When the water reaches a stage of 60.5, the fuse plug levee is intended to be overtopped, and to crevasse under either plan. The plaintiff's land is in the floodway under*

either plan, and it doesn't make any difference which is used, and would be by the same fuse plug levee" (Mathes, R. 246).

"If the fuse plug levee is left as it is, a *potential floodway* is still there with a possibility of its use *every season* under the present plan \* \* \*. Its function is to be used at any time sufficient flood water comes down the river" (Mathes, R. 246).

How then can counsel justify their effort to mislead the Court into basing a decision on the false assumption that the Boeuf Floodway has been abandoned? What a cruel mookery of respondent! How indefensible a miscarriage of justice! "*Falsus in uno, falsus in omnibus*" seems to be the ancient proverb most apposite. Anent petitioner's plea of "*speculative damages*," certainly nothing could be more *speculative* than its proffered defense of the proposed Markham Plan.

Clearly the compensation awarded respondent on this appeal must be based only on the provisions of the Jadwin Plan. See Point XI of this brief.

The lower Court erred in refusing respondent's requested Conclusions of Law Nos. 36 (R. 341), 50 (R. 347), and 52 (R. 347).

Only judgment for respondent in this Court, can replace with judicial illumination and justice the obscurity and gloom of error found in the record of the District Court. Both Facts and Law plead for respondent, and we throw not in vain.

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## POINT VII.

**CUT-OFFS. Irrelevant, Incompetent, Immaterial . (R. 239-240, 287).**

Petitioner undertook in the District Court to build practically all its substantial evidence around a program of "cut-offs" initiated by the Government a number of years *after* respondent's land had been taken for a floodway. This cutting through a number of large loops in the main channel shortened the river approximately 100 miles.

The District Court erred in refusing to adopt respondent's requested Finding of Fact No. 85 (R. 328-329).

The District Court erred in refusing respondent's requested Conclusions of Law Nos. 36 (R. 341-342), 50 (R. 347) 53 and 54 (R. 348); and erred in declaring petitioner's requested Conclusion of Law No. 4, (R. 369).

The Court will note at once that the "cut-offs" involved in the testimony constitute *no defense* at all to the alleged taking. At most such testimony could only tend to mitigate damages. They are not pleaded in defense (R. 240-241). The entire testimony on which petitioner relies on this point should be stricken from the record and from consideration because it is irrelevant, incompetent and immaterial (R. 287). These cut-offs were (1) not authorized by the Flood Control Act of May 15, 1928, (2) were not contemplated by the parties at the time of the alleged taking, and (3) are not now and have never been effective even to ameliorate respondent's loss.

1. Nothing can be more certain than that the cut-offs involved in the testimony in this case were *not* authorized

as a part of the Jadwin Plan. On the contrary, they were considered and *definitely rejected*. Cut-offs are not listed in Sec. 3, Doc. 90 (R. 119) which does purport to itemize the essential features of the Jadwin Plan. On the contrary, cut-offs are specifically considered in Secs. 69, 70 and 71 of Document 90, and are there expressly and explicitly *rejected* as being a "method too uncertain and threatening to warrant adoption" (R. 246-247).

The Mississippi River Commission reported to Congress: "Cut-offs produce reductions in river length that are *only temporary* unless the river banks above and below the cut-off have been specifically prepared for the change in slope and velocity of the river. \* \* \* Excessive velocities would continue for a long period until the bed of the river had adjusted itself to the new conditions, *something that would never be wholly achieved*" (Special Report of Mississippi River Commission, November 28, 1927, pp. 78-79, Secs. 341-342).

In his report to the Secretary of War for the Congress on February 28, 1931, the Chief of Engineers again *definitely rejected* cut-offs as not being safe as a part of the flood control program (House Document 798, Vol. 1, p. 6, Sec. 3-b—Exhibit 12-b, R. 137).

Petitioner's engineering witnesses seek to justify cut-offs, and find authority therefor, as a part of "channel stabilization" (R. 241, 244, 247). But Document 90 itself defines its own use of the words "channel stabilization" as being "a general bank-protection scheme" consisting "of *revetting banks*" (Doc. 90, Sec. 131, R. 125; also R. 244). The purpose of the Jadwin Plan, and the very meaning of the words *channel stabilization*, is to make the river

*stable* as is expressly stated in Sec. 131, Doc. 90; but no new method of treatment is authorized except that which will "accomplish the same result" (Doc. 90, Sec. 131, R. 244)—that is, make the river more stable. The cut-off program has definitely *unstabilized* the channel and has actually discarded more than 100 miles of river channel (R. 244). Even petitioner's chief witness Mathes is forced to admit: "There is no statement in House Document 90 that I know of authorizing that effect" (R. 244).

2. Even more certain is it that the speculative effects of cut-offs were not within the contemplation of the parties at the time of the taking of respondent's property because they had not then even reached the point of mental conception. General Ferguson, the present President of the Mississippi River Commission, is properly accredited with being the father of the recent cut-off program, and he did not become President of the Mississippi River Commission until 1932 (R. 265). The first cut-off was opened in 1933 (R. 238-239). Petitioner's own witnesses frankly admitted: "*These cut-offs of which I have testified were not contemplated when the Flood Control Act of May 15, 1928, was passed.* For approximately 50 years the policy of the Mississippi River Commission was as recited in Sec. 69 of Document 90. For about 50 years instead of making cut-offs, the Mississippi River Commission built dikes in these loops in the river *to prevent natural cut-offs* because they thought they were dangerous. That policy was changed by the Army Engineers some time *after February 28, 1931*" (R. 247, 248).

How then can counsel have the temerity to argue that cut-offs were a part of the Flood Control Plan authorized by the Act of May 15, 1928?



The District Court erred in refusing respondent's requested Conclusion of Law No. 54 which correctly declares: "As a matter of law, said system of cut-offs was neither contemplated or authorized by the Flood Control Act of May 15, 1928" (R. 348).

Respondent's compensation must be based solely on the Jadwin Plan. See Point XI, 3, of this brief.

3. Furthermore, the cut-off experimentation has not been effective in ameliorating respondent's loss to the slightest degree.

The strategy of the Army Engineers in building their entire defense upon the theory, being developed even during the actual trial in the District Court of respondent's case (R. 262), that recent experimentation in cut-offs has destroyed respondent's right of action is typical of "the expert, professional mind." Doubtless this highly speculative suggestion of technical theories appealed to petitioner's professional witnesses because it injected into the case much room for indeterminate and inconclusive argument as to damages sustained, and a vast amount of confusion as to the vital issues involved. But this strategy must be doomed to complete failure as a defense to the fundamental issue of whether or not there has been a "taking" of respondent's property. Apparently the "taking" is theoretically conceded by being ignored. Therefore *liability* remains regardless of what the Court may think as to the value of the cut-off testimony offered in mitigation of damages. Petitioner's testimony indicates that no other defense was available. The Army Engineers may be, as they confess, the best *engineers* in the world, but, we submit, they utterly fail to qualify as safe constitu-

tional lawyers. Their artifice, or trick in war, is deceiving. The Army seems to have a typical military surprise attack in the use of "cut-off bombs." To the judicial mind this deceptive device can only disclose a total miscomprehension of the legal principles involved in this case. We trust this effort to outsmart with theory and overwhelm with technical statistics and incomprehensible data and confusing exhibits will be futile when confronted with the constitutional rights of a humble citizen of the United States. Respondent's actual loss still stands to be remedied.

The implications intended by petitioner's engineering testimony, as we understand, are their contentions that the belated, unauthorized, experimental cut-offs have increased the discharge capacity of the main channel and thus lowered water levels in the latitude of respondent's property, especially when the water in the river is below dangerous flood levels, thus minimizing the danger to respondent's property. These engineers base their conclusions upon the experience of one flood (1937) and file many charts intended to show that during that flood there was an increased discharge capacity of the main channel of the river, which carried the dangerous, destructive flood crests further down stream than the latitude of respondent's property. What will happen when the cut-off immediately above respondent's property is completed (R. 262), no man can tell. Nor is this 1937 variation unusual (R. 271-276; 255-257).

These points might give the Court concern (a) *IF* the cut-offs had been authorized by the Flood Control Act of May 15, 1928, and (b) *IF* the suggested results had been

true *at the time of the taking*, and (c) *IF* those claimed results were reasonably both *certain* and *permanent*, and (d) *IF* those authorized results had been generally known at the time of the taking of respondent's property so as to have been contemplated at the time she was entitled to her "just compensation," and (e) *IF* these results had prevented the actual loss of market value which respondent's property has sustained. If all of these "IF'S" could be eliminated, the amount of appellant's recovery might be *reduced*, but certainly *not defeated*.

However, these suggested implications and astonishing conclusions of petitioner's engineering witnesses, subordinate employees, are irreconcilably inconsistent with the public declarations of those authorized to speak for the United States when appealing to Congress for appropriations and constructive legislation. The failure of petitioner to give this Court the benefit of the direct testimony of the Chief of Engineers and of the President of the Mississippi River Commission on the value of cut-offs is significant and without justification. Those authorized spokesmen for the Government have repeatedly committed themselves and the United States in direct contradiction to the contentions of these subordinates seeking by their testimony to defeat justice in the trial of the lawsuit.

As late as April, 1935, long after the filing of respondent's suit, the President of the Mississippi River Commission testified to the Congress: "*We have never claimed that they (cut-offs) would do anything to floods at all.*" (HEARINGS, House Committee on Flood Control, April 1-13, 1935, p. 681; R. 249).

At the same time the District Engineer in charge of the Vicksburg office was telling Congress: No prudent person would build a home in the floodway. The flood hazard in the floodway is continuous. In order to avoid the hazard and danger that the spillway creates people would have to build their houses upon stilts 20 feet high (House HEARINGS, April 1-13, 1935, pp. 132-133, 148).

Every Chief of Engineers since 1927 *to the present moment* has continued to state emphatically and repeatedly on every proper occasion that the result of the cut-offs has not altered the composite view of the Corps of Engineers as to the necessity of the floodway in this Middle Section. See Points II and III of this brief.

In fact, *immediately before* the trial in the District Court, with all the information resulting from the operation of the cut-offs during the 1937 flood, the President of the United States was assuring the Congress that instead of the 1937 Ohio flood tending to mitigate respondent's damage, and in spite of everything that had been accomplished by the cut-off experiments, the damage to property in the floodways used during the 1937 flood was so much greater than the Army Engineers had anticipated that the Chief of Engineers was recommending "securing fee-simple title to floodways on the Mississippi River." The President stated April 28, 1937: "It occurs to me that, in view of the history of previous legislation and its results, *this is advisable* in order that no questions may arise if it is found necessary to flood these lands. At the same time, it may be well to consider the possibility of renting these lands, once fee-simple title is acquired, to neighboring farmers, with the definite understanding that

*tillage of these lands is solely at the risk of the individual renting them*" (Com. Doc. No. 1, 75th Congress, 1st Session, p. III).

Flatly contradicting the *opinions* and conclusions of petitioner's witnesses in this case, the Chief of Engineers was of the opinion that since so much more water came out of the Ohio River in 1937 than had ever come before, it completely upset all former assurances of safety under the Jadwin Plan. General Markham realized that the Boeuf Floodway lands were saved *only* by the absence of water in the upper Mississippi and in the Arkansas and White River basins. He officially states: "In January, 1937, long-continued heavy rains in the basin of the Ohio River \* \* \* produced a flood of unprecedented magnitude. The river rose to a height of 80 above low water at Cincinnati, being nearly 9 feet above any flood heretofore of record. The resulting damage was enormous.

"Although the discharge out of the Ohio reached a record maximum of 1,950,000 cubic feet per second, *the Mississippi above Cairo was at a low stage in January and February and added little to this discharge. \* \* \* The Arkansas and White Rivers were not in high discharges, so that it was not necessary to make use of the floodways below their confluence*" (Com. Doc. No. 1, 75th Congress, 1st Session, p. 3, Secs. 8, 9).

Does General Markham, the then Chief of Engineers, think that the cut-offs have lessened the flood hazard to respondent's property? *He does not.* On the contrary, he deems the use of the floodways more imperative than ever, and has become convinced that the Government



should buy the outright title to the lands on the floor of the floodway. He assured the Congress, and this Court:

"The experience of the recent flood points to the need for certain modifications in the provisions of the authorized project for the flood control of the Alluvial Valley. The *most important* of these relates to the acquisition of lands in the floodways. *FLOODWAYS for the escape of waters in excess of the capacity of the leveed channel ARE ESSENTIAL if the levees are not to be crevassed in great floods.* The reservoirs set up in this report may reduce, to some degree, the frequency with which they must be used, but *the floodways will still be requisite* to assure the safety of the areas to be protected. \* \* \* As a result of recent experience in the Birds Point-New Madrid Floodway, I am now of the opinion, that *no plan is satisfactory which is based upon deliberately turning flood waters upon the homes and property of people, even though the right to do so may have been paid for in advance. I believe that all lands within the floodways proper for which the purchase of flowage easements is now authorized should be secured by the United States in fee simple, and their future use limited to purposes not in conflict with our requirement as floodways*" (Com. Doc. No. 1, 75th Congress, 1st session, p. 10, Sec. 32).

Does this public declaration of official policy, from an *authoritative source*, in fact the very official charged with the duty of constructing all of the Government flood-control works (Sec. 1 of Act of 1928), tend to diminish respondent's loss of the market value of her property? Rather does it not completely annihilate the technical defense of cut-offs tendered in this case?

Furthermore, with devastating effect on the testimony of petitioner's underling witnesses, the Chief of Engineers amplified and emphasized his formal report just referred to by testifying before the House Committee on Flood Control on June 8, 1937. *After the trial in the District Court*, with full knowledge of all that the cut-off program had accomplished, the Chief of Engineers was defending his recommendation that the United States buy outright the fee simple title to the lands constituting the floor of these floodways. Not only did the Chief of Engineers unequivocally and emphatically insist that respondent's property on the floor of the Boeuf Floodway is still subject to the same continuing flood menace which destroyed its market value years ago, and that the flood hazard as described in the Jadwin Plan will continue for an indefinite length of time in the future notwithstanding the "cut-off" developments and in spite of all the reservoir construction of which enthusiastic theorists have dreamed, but he frankly admitted, and warned the Congress, that the 1937 flood experiences justified even greater alarm for the future than the Corps of Engineers had anticipated in the past. He testified:

"Two major things" (not cut-offs) have developed causing my recommendation that the lands be acquired in fee instead of acquiring flowage rights.

"As we saw the necessity for diverting flood water down the New Madrid floodway we tried for a number of days to be prepared. Holding off as long as we dared but recognizing the approaching crisis for Cairo, we found that it was approximately impossible to get people out of the path of the water. So the matter came finally toward a dramatic climax, with our telephoning, as we did nightly to the Memphis office, *having to insist ultimately that that*

*levee be blown, regardless of the fact that 125 people were known to be in the New Madrid floodway. It was a rather desperate situation. We did not know whether it was 125 or 425, definitely, but there were at least 125, but we had to open the floodway. We did not want to pour great volumes of water upon people who were trapped in a floodway. Yet we felt at the time that that was the only thing we could do. And it was done between midnight and the following morning at daylight.*

*"Again, in trying to keep up with the prospects of getting flowage in the Eudora and Morganza floodways at what the law calls reasonable rates, we become highly doubtful that we were going to get flowage at very much less than the fee cost. \* \* \* I concluded that as between the two considerations, the Government was probably better off to buy the fee than to attempt to secure the flowage. On the other hand, I am perfectly frank to say I do not like it, because last year my thought was that no such acreage of land should be condemned and put out of cultivation, or should be obstructed other than to have some sort of a flowage easement whereby the State would still have the production of those lands, with the tax values that related to them, with the people finding the means of granting flowage and still protecting themselves against being flooded by these vast volumes of water, which, in the Eudora, if the superflood comes, would mean levees to take a million cubic feet of water to flow down at a depth of approximately 20 feet. \* \* \* If we do not have a floodway we may have to turn a million cubic feet of water onto a number of thousands of people. \* \* \* The difficulty is this, that here comes water down from the upper river, as to which, if nothing happened down in the Arkansas and White Rivers, we can pretty*

closely know what the Vicksburg or any other gage is likely to be; but if we have a cloud burst, or a tremendous rainfall on the Arkansas and White, we might have to change our minds in a great hurry, so that there might possibly be little notice down there in those floodways" (House HEARINGS, June 7-11, 1937, pp. 57-59).

"I think that the operation of these floodways is absolutely unavoidable." It would probably take 40 or 50 years to complete the reservoirs recommended even if they were authorized and the money was available (House HEARINGS, June 7-11, 1937, pp. 59, 66).

"It might well be that in the floodway the people would have their homes on the sides, or that they would use tentage instead of permanent buildings. If we took over the property, or acquired the fee, I think we would definitely prevent permanent structures being built in the floodway. It is to be presumed that there would be no property that would tie the occupants down particularly in the floodway. Stock raising would be permitted at their own risk. People in the valley themselves say that they will never consent to the purchase by the United States of the fee" (Gen. Markham, House HEARINGS, June 8, 1937, pp. 70, 64).

*Secretary of War.* The various flood control acts of Congress have authoritatively designated the Secretary of War as the official spokesman of the United States of last resort. In complete demolition of the theory of petitioner's underling engineers, after the trial of this case in the District Court, with full knowledge of everything which the 1937 flood had proved in connection with the "cut-off" experiments, the Secretary of War, voicing the composite opinion of the entire Corps of Engineers, assured the Con-

gress: "The flood (1937 Ohio Valley flood) demonstrated the need for the *IMMEDIATE COMPLETION OF THE AUTHORIZED FLOODWAYS* in the lower Mississippi River project. It further demonstrated the need for reservoirs to impound flood waters and thus provide an additional factor of safety for the lower valley, \* \* \*" (Secretary of War Woodring, House HEARINGS, June 7-11, 1937, pp. 16-17).

Even while the case was pending in the Circuit Court of Appeals, the present Chief of Engineers, Maj. Gen. Julian L. Schley, again officially assured the Congress on March 28, 1938, that: as a general proposition, *there has been no change in the composite judgment of the Army Engineers since the enactment of the Overton Bill on June 15, 1936, as to the necessity for construction of the Eudora and the Morganza Floodways in order to take care of the water that may be expected to pass down the river.* (Gen. Schley, HEARINGS, Senate Commerce Committee, March 28, 1938, p. 27).

And on March 30, 1938, before the House of Representatives, Committee on Flood Control, with all the data before him of the operation of the cut-offs during the 1937 flood (including even the secrets of his subordinate hydraulic experts), the Chief of Engineers again testified: "The records and studies concerning the Mississippi River, already collected and recorded since 1879, constitute the most thorough and voluminous example of river engineering information ever assembled by any nation. \* \* \* There has been *no change* in the idea of the Corps of Engineers that a floodway on the west side of the main channel of the Mississippi River south of the Arkansas River is still neces-



sary in any adequate flood control plan for the alluvial valley of the Mississippi River. We have only the floods of any magnitude which have passed down the river between the levees to judge by; and *that is too little*, because the floods of the Mississippi River vary tremendously. There was never anything like the flood of 1937 in the recorded history of the river itself. So, *until we could have a number of floods of great magnitude to actually test the river it would be impossible to say what its capacity is*. I stand on our recommendation which provides for a diversion in the middle section of the river, and also one in the lower span. *Both are necessary.*" (HEARINGS, House Committee on Flood Control, March 30, 1938, at pp. 3, 17, and 31).

The next day, March 31, 1938, General Harley B. Ferguson, as President of the Mississippi River Commission which is responsible for all authorized flood control works on the Mississippi River, the "father of the cut-offs," testified: "I still make no recommendation for the elimination of either one of the floodways. I concur in the report of the Chief of Engineers submitted after the flood of 1937 (April 6, 1937) recommending the appropriation of an additional \$14,000,000 for the United States to acquire the fee title to lands in the floodways. \* \* \* During the 1937 flood, there was a difference of 7.3 feet in the gage at Arkansas City with substantially the same discharge, one of the gages being taken at the beginning of the flood and the other at the conclusion. The variation in the curve that we call the capacity of the rising river and the capacity of the falling river is enormous—it is startling." (HEARINGS, House Committee on Flood Control, March 31, 1938, at pp. 39, 41 and 45).

*The record in this case is overwhelming to the effect that "cut-offs" (1) increase channel and levee hazards, (2) are purely temporary in their effect, (3) are local in their effect, (4) are ineffective at dangerous flood stages when the water extends from levee top on one side to levee top on the other side of the river, the only time when property owners behind the fuse plug levee need relief, and (5) lead to deterioration below the cut-offs because of the increased velocities through the cut-offs causing bank caving. Also, the single, unique 1937 flood is not a safe test as to the value of cut-offs (R. 276, 280), and the local temporary effects shown in the vicinity of Arkansas City during the 1937 flood will be changed with the completion of the Caulk's Neck cut-off immediately above Arkansas City which was being made during the trial in the District Court (R. 262, 276, 284). (Neptune, R. 272-277; Wonson, R. 279-281; Simons, R. 282-283; Carter, R. 284; Heagler, R. 285-286).*

*"The cut-offs are most effective while the river flows in its natural channel between its natural banks. \* \* \* There is no flood menace behind the fuse plug levee until the water approaches the top of the fuse plug levee. When this stage of the river is reached, the flood plane of the river is from the top of the levees on one side to the top of the levees on the other side, and at this point the cut-offs will be of so little effect as to be of no substantial protection whatever to the respondent's property" (Neptune, R. 275-276).*

*"These cut-offs certainly will not reduce the flood hazard. I am inclined to believe they will tend to increase the flood hazard" (Wonson, R. 280).*

*"The cut-offs neither have had, or will have, any effect on the flood hazards of plaintiff's property. No effects have been indicated that would prevent the overtopping of the fuse plug levee"* (Simons, R. 283).

*"I do not think these cut-offs will be beneficial, or have any appreciable effect on the flood hazard of plaintiff's property in the future. \* \* \* Only with the gage of the Mississippi River levees 60.5 on the fuse plug levee is there danger of the fuse plug levee being overtopped and thus menacing the plaintiff's property. At that stage, I do not think the cut-offs will decrease the flood hazard at all"* (Carter, R. 284).

*"I do not think that these cut-offs in the channel of the Mississippi River have done away with the flood hazards to plaintiff's property created by the placing of plaintiff's property in the Boeuf Floodway by the Flood Control Act of May 15, 1928. The effects of the cut-offs are local and temporary. There has been a serious deterioration in the river below Arkansas City"* (Heagler, R. 285).

*"We have never claimed that they (the cut-offs) would do anything to floods at all"* (Gen. Ferguson, President of the Mississippi River Commission, House HEARINGS, April 1-13, 1935, at p. 681, R. 249).

When confronted with this orthodox engineering testimony, petitioner, in sur-rebuttal, closed its case in a most astounding manner. Its reply to respondent's engineering evidence was the remarkable contention that the preposterous position taken by petitioner's underling engineering witnesses can be explained only by the fact that they are in possession of some sort of mystical secret about flood control and cut-offs which would make their testimony un-

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derstandable, and satisfactory to other engineers, only if those engineers had possession of this esoteric knowledge; but petitioner solemnly assured the Court that it would be impossible for any engineer other than the Government's hydraulic experts who testified at the trial to secure that information. Petitioner's chief engineering expert Mathes, swore: "The principles that have been employed in this work which we have discussed in this case relating to channel stabilization are novel. They are novel to the extent that *no description of them, or of the hydraulic principles which were employed, have ever appeared anywhere in print.* I speak advisedly because I am concerned with making that subject public when the time comes, when I am permitted to do so. Up to the present time *none of the engineer witnesses for the plaintiff who have testified here have been in position to discover, or to find out, either by study or by inquiry, just what are the hydraulic principles employed. It has not been made public.* \* \* \* I am frank to say that *I am not at all in disagreement with the statements which these engineers, and especially those experienced with the cut-off work, have made, because from their point of view and under the conditions which they described, they were probably entirely correct.* Those conditions are not applicable to what we are doing on the Mississippi River today. As I said, *the work is being done in a novel manner; and I do not see how it is possible for any engineers outside of those immediately connected with it to be in a position to judge whether it is being done right or wrong*" (R. 290). This startling testimony is not only astounding and incomprehensible, but strikes one as being more relevant to some voodoo trial in an African jungle rather than competent testimony in the United States of America between a just



sovereign and one of its helpless, wronged citizens. It is also obvious from the recent quotations from Generals Markham and Schley and the Secretary of War that these mystical and undisclosed subtleties are confined solely to the minds of petitioner's hydraulic experts testifying in the District Court, and are wholly beyond the comprehension of the Chiefs of Engineers when explaining engineering necessities to the Congress.

On the contrary, the hydraulic history of cut-offs on the Mississippi River from the earliest times is well known by engineers. From Ellet's Report in 1852 ("Mississippi River Flood Control and Navigation," War Department, May 1, 1932, Vol. III, Plate LXVII), until long after the passage of the Flood Control Act of 1928, cut-offs have been uniformly condemned as *pernicious* and *dangerous*. (See Appendix F of this brief; and Secs. 69, 71, Doc. 90, 70th Congress, 1st Session).

Therefore, the *ONLY* attempted technical defense offered by petitioner, viz., its *theory* that the flood menace to respondent's property has been removed by its mystical cut-offs, has *utterly collapsed*. When considered as a *defense*, petitioner's testimony on this point is manifest rubbish. It starts off from assumptions that are obviously untrue, and therefore, reaches conclusions that are openly at war with both logic and the facts.

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## POINT VIII.

## Depression and Tax Burden

Though not pleaded (R. 18, 77), and though wholly irrelevant to the legal issue of "taking," in futile fishing for some defensive testimony in the District Court, counsel for petitioner sought to prove by innuendo and general misinformation that respondent's loss of market value was due largely to (1) the general economic depression which began in 1930, following the inflation of 1929, and (2) the tax burden upon respondent's land, thus misleading the District Court into its erroneous Findings of Fact Nos. 38 (R. 363) and 42 (R. 364). The *undisputed facts* peculiar to respondent's property, and this case, reveal the absurdity of these theories.

A. *The Depression Bugaboo.* The general depression of 1930-1934 cannot reasonably be used to explain a single dollar of the loss of market value sustained by respondent's property, however much petitioner's counsel may argue to the contrary. It is a matter of general knowledge, of which this Court takes judicial notice, that the economic depression referred to *began in 1930* with a collapse following an unprecedented boom during 1929. The market value of respondent's property was destroyed in the *autumn of 1928*, when it first became generally known that her land had been dedicated by the United States as a floodway. This was in the very midst of the general inflation boom of values enjoyed by the rest of the country. When the depression began *18 months later* respondent's property had no substantial value to be affected. Numerous witnesses testified to this fact, firm and fixed in the record so far as respondent's land is concerned. Her *right* and opportunity to take

advantage of the high prices enjoyed elsewhere in 1929 *was taken* from her by the Flood Control Act of May 15, 1928.

The District Court erred in not correctly finding: "The general economic depression which affected the country at large, beginning with the year 1930, does not account for any of the loss of market value to petitioner's (now respondent) property hereinbefore referred to, because petitioner's property had lost its market value as hereinabove recited many months before the general depression of 1930 began. While general property values elsewhere were at a peak during the boom prices and inflation of 1929, the petitioner's property, and other property *in that vicinity* in the Boeuf Floodway, had lost its market value as hereinabove stated. There was not enough value left to be seriously affected by the later depression. *One cannot kill a dog already dead.* Furthermore, the passing of the general depression and the return to normal values and prices of farming properties generally in protected areas has not, and will not, bring back the market value of the petitioner's property, or other property *in that vicinity* on the floor of the Boeuf Floodway. Therefore, *under the peculiar facts of the case at bar*, the general economic conditions of the country elsewhere have played, and will play, no important part. They offer no explanation whatever of petitioner's special and peculiar loss" (R. 322). *Res ipsa loquitur.*

"The general national economic depression began in 1930. *No part of the loss of plaintiff's (now respondent's) market value can be attributed to that general depression because plaintiff's land had lost its market value prior to that time.* No part of her loss of approximately \$100 an acre can be attributed to that depression. *It had already*

been lost. At the present time, when the depression is passing and the Department of Agriculture reports a return in general agricultural values over the country as a whole to 82% of pre-war level, *no part of the market value has been restored to plaintiff's land in this floodway*" (Hopson, R. 187-188).

"The market value of plaintiff's property was destroyed prior to the general economic depression beginning in 1930" (Baxter, R. 192).

"The general economic depression that began in 1930 did not account for any of the loss of market value of the plaintiff's property. She did not have anything to lose. *She had already lost everything she had. You can't kill a dead dog. The market value of her property had already been ruined.* There is something radically wrong when these fine lands are selling from six bits to a dollar an acre" (Parker, R. 199).

"I do not think the flood of 1927 had any effect on the market value of these lands, cheap cotton, *high taxes, bonded indebtedness*, mortgage indebtedness, *depression* and general trouble has been on the land before and *did not affect it up until the time it was put in the floodway*, so I don't see why they could materially affect the market value then" (Zellner, R. 202).

"*No part of plaintiff's loss of market value can be fairly attributed to the economic depression which began in 1930 because it was generally known that plaintiff's property was in the floodway and it had lost its value before the depression came*" (Neal, R. 203).

"General difficult economic conditions to a certain extent adversely affect market value, but the farmer who

carries a reserve does not pay much attention to economic fluctuations in land values because they come back if you are able to hold them. After plaintiff's property had been placed in the floodway in 1928, it had no substantial market value in 1929 when cotton was selling at 18c a pound. I think the value of that land was gone. Nobody could borrow any money on it or get any insurance on it. I couldn't figure why anybody would buy it. *I do not think the economic conditions would have anything to do with property in that floodway. I do not think property in the floodway would be able to participate, or take part in, the general upturn and return to prosperity*" (Mann, R. 206-207).

"I am familiar in a general way with economic conditions, the values of commodities, and such things. *The change of values generally will not change the situation as to the market value of plaintiff's land so long as it remains in the Boeuf Floodway, unless after a long term of years they build reservoirs so that the floodway would never fill up. Maybe within a quarter of a century we might decide it is not going to be the channel of the Mississippi River, which I think it is going to be*" (Matthews, R. 208-209).

"No part of the loss in market value of plaintiff's land, and land in that vicinity, can be attributed to the economic depression which began in 1930, because *their market value had already been destroyed before the depression started*" (Zebold, R. 210).

B. *The Tax Burden Bugbear* was likewise an unsubstantial spectre of the imagination of petitioner's counsel in the District Court. The conclusive refutation of this argument is the undeniable fact that respondent's property



new policy of Federal responsibility for flood control on the lower stem of the Mississippi River (see Point V, B, 2); and that this new policy was expressed by the enactment into law of "one comprehensive project" for the purpose. The Jadwin plan is a unit. When the first spade full of dirt was placed under the Jadwin plan, it began work on the single project which has resulted in the practical destruction of the market value of the respondent's property. See Point II.

But the most inescapable reason for Federal liability on account of respondent's loss, and the conclusive distinction between the present case and the decisions in the *Cubbins*, *Hughes* and *Jackson* cases, is that the Flood Control Act of May 15, 1928, for the first time, by law, took from the respondents their former right of *self-defense*.

After pointing out in a most emphatic way the fact that the damage caused in the *Cubbins* case resulted as a mere incident to the Government's work which was limited to "improving navigation" under the Eads Plan, Chief Justice White reviewed the history of the law of waters from its very inception, and then definitely based the decision on the exception to the general rule of the law of waters to the effect that in times of "accidental and extraordinary floods" every man could protect his own property (as by the building of private levees around his lands) without liability to his neighbors, "BECAUSE all, as the result of the accidental and extraordinary conditions, were entitled to the enjoyment of the common right to construct works for their own protection." "• • • the principles thus stated in no way serve to prevent or to limit the right of proprietors whose lands border on or

are traversed by rivers 'from guarantying themselves against damage by defensive works, constructed either upon the border of the rivers or in the interior of their property,' \* \* \* because each one is entitled to do the same in his own behalf, as the right of preservation and of legitimate defense is reciprocal, since *it is impossible to conceive that the law would impose upon the proprietors bordering upon streams an obligation to suffer their property to be devoured (by accidental or extraordinary overflows) without the power on their part to do anything to protect themselves against the disaster.*" 60 L. ed. 1047. So the court thought in 1916.

The court further expressly declared that the Jackson case was decided on the same principle, to-wit: " \* \* \* upon the broad ground that the rights of both owners on each side embraced the authority, without giving rise to legal injury to the other, to protect themselves from the harm to result from the accidental and extraordinary floods occurring in the river, by building levees, if they so desired." 60 L. ed. 1049.

This primeval right of self-defense is definitely and certainly taken from respondent by the enactment into law of the Jadwin plan. The dwellers in the Boeuf Floodway can no longer "protect themselves from the harm to result from the accidental and extraordinary flooding occurring in the river, by building levees, if they so desired."

Since May 15, 1928, the law has been that: "The United States must have control over the Cypress Creek levee and keep it substantially at its present strength and present height" (Doc. 90, sec. 120, R. 124). "To insure that excess water will leave the main river, a fuse plug

section of the levee in the vicinity of Cypress Creek *must* be kept at its present strength and at its present grade, viz., 3 feet below the new levee grade" (Doc. 90, Sec. 118, R. 124). "By far the major portion of the Jadwin plan *depends upon* spillway relief." (Governor Martineau of Arkansas, late United States District Court Judge, House Flood Control Committee Hearings, January 5-17, 1928, Part 4, p. 2500.) See Point IV for complete demonstration and proof.

2. *Constitutional Authority.* Nor can there be any doubt of the full right and authority of the Congress to have taken this action. In *Scranton v. Wheeler*, 179 U. S. 141, 21 S. Ct. 48, 45 L. ed. 126, at p. 136, the court declares: "The power to regulate commerce is the basis of the power to regulate navigation and navigable waters and streams, and these are so completely subject to the control of Congress, as subsidiary to commerce, that it has become usual to call the entire navigable waters of the country the navigable waters of the United States. . . . So wide and extensive is the operation of this power that no State can place any obstruction in or upon any navigable waters against the will of Congress, and *Congress may summarily remove such obstructions at its pleasure.*" 45 L. ed. 136. See Epilogue, this brief.

In *Gilman v. Philadelphia*, 3 Wall. 713, 724, 18 L. ed. 96; 99, the court said: "Commerce includes navigation. The power to regulate commerce comprehends the control for that purpose, and *to the extent necessary*, of all the navigable waters of the United States which are accessible from a State other than those in which they lie. For this purpose they are the public property of the nation, and

subject to all the requisite legislation by Congress." \* \* \*  
 "It is for Congress to determine when its full power shall be brought into activity, and as to the regulations and sanctions which shall be provided." 45 L. ed. 136.

In *Wisconsin v. Duluth*, 96 U. S. 379, 24 L. ed. 668, 670, the court holds: "Where Congress has taken exclusive charge and control of a harbor improvement, that action is conclusive of any right to the contrary asserted under State authority." The court says: "It is to be observed, as preliminary to an examination of the Acts of the General Government in the special matter before us, that the whole system of river and lake and harbor improvements, whether on the seacoast or on the lakes or *the great navigable rivers of the interior*, has for years been mainly under the control of that Government, and that, whenever it has taken charge of the matter, its right to an exclusive control has not been denied." 24 L. ed. 668.

In *United States v. Chandler-Dunbar W. P. Co.*, 229 U. S. 53, 33 S. Ct. 667, 57 L. ed. 1063, the court emphasized: "It is for Congress to determine when its full power shall be brought into activity, and as to the regulations and sanctions which shall be provided."

The Chief of Engineers of the United States declares: "The Mississippi River is the world's greatest river, combines size with usefulness, and is one of the grandest and most valuable *assets of the United States*" (Doc. 90, sec. 43, Tr. 121). See Epilogue, this brief.

Before closing the discussion of *Cubbins v. Mississippi River Commission*, *supra*, we note that the court specifically rejects the suggestion of General Jadwin, and of coun-

No. 92 by the Acts involved and judicial notice, Doc. 90, sec. 121, R. 124;

No. 94 by Seybold R. 258, Mathes R. 247;

No. 95 by maps, R. 391, Mathes R. 246;

No. 96 by the Acts involved;

No. 100 by Stipulation, R. 291-298, 151, Sponenbarger R. 179-181, R. 80-81.

When these *uncontroverted* and *incontestable* Findings are considered in connection with those Facts established by the unquestionable Public Documents referred to in subdivision 1 of this Point petitioner cannot escape the just, judicial logic which requires judgment for respondent as prayed (R. 16, 334, 350).

3. Each of the other Findings of Fact requested by respondent not covered by subheadings 1 and 2 of this Point, are thoroughly covered and established by the other Points of this brief.

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## POINT X.

*Decisions, relied on petitioner, distinguished.*

The petitioner relies upon such decisions as *Cubbins v. Mississippi River Commission*, 241 U. S. 351, 36 S. Ct. 671, 60 L. ed. 1041; *Jackson v. United States*, 230 U. S. 1, 33 S. Ct. 1011, 57 L. ed. 1363; *Hughes v. United States*, 230 U. S. 24, 33 S. Ct. 1019, 57 L. ed. 1374; *Sanguinetti v. United States*, 264 U. S. 146, 44 S. Ct. 264, 68 L. ed. 608; *Horstmann Co. v. United States*, 257 U. S. 138, 42 S. Ct. 58, 66 L. ed. 171; *Bedford v. United States*, 192 U. S. 217, 24 S. Ct. 238, 48 L. ed. 414; and *Gibson v. United States*, 166 U. S. 269, 17 S. Ct. 578, 41 L. ed. 996; *Willink v. United States*, 240 U. S. 572, 36 S. Ct. 422, 60 L. ed. 808.

The Circuit Court of Appeals readily distinguished these and similar decisions from the authorities upon which respondent is relying in this brief. The principles therein announced have absolutely no application to the facts in the case at bar. None of these decisions, nor any other decision which petitioner can cite with effect, are based upon the Flood Control Act of May 15, 1928, but were all prior to that revolutionary enactment by the Congress of a new statutory rule of law.

In *Horstmann Co. v. United States*; *supra*, the court points out that the damages therein involved "could not have been foreseen or foretold." The court says: "• • • it would border on the extreme to say that the Government intended a taking by that which no human knowledge could even predict. Any other conclusion would deter from useful enterprises on account of a dread of incurring unforeseen and immeasurable liability." "The court found that

there is obscurity in the movement of percolating waters, and that there was *no evidence* to remove it in the present case, and necessarily there could not have been foresight of their destination, nor *purpose to appropriate* the properties." 66 L. ed. 175.

On the contrary, in the case at bar we have shown that the Jadwin Plan very *definitely* and *certainly foresees* and *foretells* exactly what is to happen to respondent's property in Boeuf Floodway, and the Congress, with constitutional *foresight*, expressed its deliberate "*purpose to appropriate the properties.*"

In *Sanguinetti v. United States*, 264 U. S. 146, 44 S. Ct. 264, 68 L. ed 608, on which petitioner seems to place special emphasis, the decision is wholly inappropos because there the court merely announced the well understood legal principle that: "There is no remedy against the United States for *tort* in casting water on private property." No tort is involved in the case now before this court. Also the court again emphasized the determinative importance of the *intention* of the Government, saying: "It was not shown, either directly or inferentially, that the Government or any of its officers, in the preparation of the plans or in the construction of the canal, had any *intention* to thereby flood any of the land here involved, or had any reason to *expect* that such result would follow: \* \* \* It was not shown that the overflow was the *direct or necessary result* of the structure; nor that it was within the *contemplation of*, or reasonably to be *anticipated* by, the Government. If the case were one against a private individual, his liability, if any, would be in *tort*. There is no remedy in such case against the United States." 68 L. ed. 610.

This language cannot possibly be truthfully applied to the facts alleged in the case at bar. In fact, it is the very converse of the instant case and therefore proves our point.

In *Jacobs v. United States*, (5th Circuit) 45 F. (2d) 34, the court discussed and distinguished in detail the *Sanguinetti* case by pointing out that: (1) When the Sanguinetti work was constructed, the flooding of the land sued for was *not contemplated or reasonably to be anticipated*; (2) That prior to the construction of the canal by the Government, the land had been subject to the *same* periodic overflow, and if the amount was increased, the extent of the increase was *purely conjectural*; (3) That it was *not shown* that the overflow was *a direct or necessary result of the structure*; (4) That the facts were such as to preclude the *implication by the government to pay*, because there was no contemplation of the damage, nor could it be anticipated; (5) That the overflow of claimant's lands was not shown to be a direct or necessary result of the canal built; and (6) There was *no authorization for the purchase of an easement*.

Wherein, then can petitioner find any consolation by citing the Sanguinetti case in the present proceedings?

1. Re: *Self-Defense*. The *Cubbins*, *Jackson*, and *Hughes* cases readily distinguish themselves. They were all decided many years *before the Government assumed responsibility for flood control*—the *Cubbins* case, the last having been decided June 5, 1916, more than twenty-three (23) years ago. (241 U. S. 351, 36 S. Ct. 671; 60 L. ed. 1041.) The fact was stressed in the congressional debates that the Flood Control Act of May 15, 1928, destroyed the force of such precedents as the *Cubbins*, *Hughes* and *Jackson* cases by deliberately adopting for the first time the

against petitioner and *require* judgment on this appeal for respondent. All else can go *only* to the *amount* of the judgment.

2. Respondent's requested Findings of Fact established by *undisputed* and *indisputable evidence*, are as follows:

No. 1 by Sponenbarger R. 179-180;

No. 2 by the pleading itself, R. 4-16;

No. 22 by Neptune R. 158, Wonson R. 167, Simons R. 175, Mathes R. 238, 244;

No. 23 by Seybold R. 258;

No. 24 by R. 138-139, Neptune R. 162, Wonson R. 170, Simons R. 178;

No. 30 by Oliver R. 253, Wonson R. 168-169, Mathes R. 246, Neptune R. 157, 158, 164, Seybold R. 258, and *passim*;

No. 32 by R. 142-144, 147, 148, 395, Neptune R. 157, Wonson R. 167, 171, Simons R. 175-178, Mathes R. 248-250, and *passim*;

No. 33 by Neptune R. 161, 278, Wonson R. 170, Simons R. 174, Hopson R. 184;

No. 34 by Oliver R. 251, Neptune R. 157, 165, Wonson R. 172, Simons R. 177;

No. 35 by Oliver R. 251-253, Neptune R. 158, 159, 164, Wonson R. 168;

No. 36 by Markham R. 144, Neptune R. 160, Wonson R. 281, Doc. No. 90, secs. 97, 118, 120, 121, R. 123, 124;

No. 38 by Neptune R. 161, 163, Wonson R. 170, 171, Simons R. 174;

No. 45 by Sponenbarger R. 179;

No. 46 by R. 179, 181, 185, 397 and maps;

No. 47 by maps and R. 395, Neptune R. 159, 160, 163, Wonson R. 168, Simons R. 176;

No. 48 by Point III;

No. 49 by Doc. 90, sec. 56, R. 121-122, Wonson R. 169, Neptune R. 161, 163;

No. 50 by Simons R. 177;

No. 51 by R. 397, Neptune R. 160, 161, Simons R. 177;

No. 53 by Doc. 90, sec. 80, R. 122, Doc. 798, p. 25, R. 138, Simons R. 177;

No. 54 by R. 397, Sponenbarger R. 179, 181, Hopson R. 185, 187, Baxter R. 194, Parker R. 197, Zellner R. 202, and *passim*;

No. 55 by Hopson R. 184, 185;

No. 56 by Sponenbarger R. 182, Hopson R. 185, Clayton R. 201, Zellner R. 202, Neal R. 203;

No. 57 by R. 399;

No. 58 by Sponenbarger R. 180, Hopson R. 185, Baxter R. 192, Thompson R. 195, Parker R. 197, Clayton R. 201, Zellner R. 202, Neal R. 203, Courtney R. 204, Mann R. 206, Prewitt R. 207, Matthews R. 208, Zebold R. 210;

No. 59 by Sponenbarger R. 182, Hopson R. 188, 189, Baxter R. 193, Parker R. 197, and *passim*;

No. 61 by Sponenbarger R. 181, Baxter R. 194;

No. 69, by Sponenbarger R. 181;

No. 72 by R. 137, 142, 180;

No. 76 by Doc. 90, sec. 96, R. 122, Doc. 798, p. 2, R. 137, Doc. 798, p. 47, R. 139, Markham R. 150, Neptune R. 166, Wonson R. 172, Mathes R. 243, Clemens R. 259;

No. 83 by Mathes R. 251, Clemens R. 262, Markham R. 140, 141, 143, 145, 146, 249, 250;

No. 84 by Mathes R. 246, 249, 250, Seybold R. 258, Clemens R. 262;

No. 87, by Neptune R. 166, Wonson R. 282, Simons R. 178, Carter R. 284;



*in the floodway, so I don't see why they could materially affect the market value then*" (Zellner, R. 202).

*"The low price of cotton, overlapping of taxes and heavy tax burdens, and general difficult economic conditions to a certain extent adversely affect market value, but the farmer who carries a reserve does not pay much attention to economic fluctuations in land values because they come back if you are able to hold them. \* \* \* Farmers are the most optimistic people on earth. They think that next year is going to put them on their feet. People with money do not let these economic fluctuations bother them, because it has been my observations that if anybody can hold lands such as these, they always come back whether it is worth \$10 an acre or \$100 an acre \* \* \**" (Mann, R. 207).

*"No part of plaintiff's loss in market value can be attributed to the tax burden because plaintiff's land was wholly in production and she was paying her taxes and was not disturbed by \$1 an acre tax"* (Zebold, R. 210).

The increases of improvement district taxes and assessments and bonded indebtedness on lands in this vicinity were between 1918 and 1925 (petitioner's expert Bayley, R. 231), long before respondent purchased her land in 1927, all of which was in actual cultivation and production (Sponenbarger, R. 179).

As Point VII disposes of petitioner's expert engineering testimony, so does this Point VIII dispose of its expert lay testimony. On the entire record, without substantial contradiction, respondent was entitled to judgment in the District Court for the entire amount sued for (R. 16, R. 334, par. 101; R. 350, par. 61).

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## POINT IX.

**FINDINGS OF FACT, requested by respondent, justified.**

The purpose of this Point is to stress the legal fact that *each* Finding of Fact requested by respondent (R. 298-334) is justified by the evidence, and supported by the record, by either (1) official Public Documents, in evidence by stipulation (R. 298 and 156), or by (2) *Undisputed* Testimony, or by (3) overwhelming and indubitable *Evidence*. This is demonstrated by a careful checking of each numbered request against the transcript Record reference immediately following, as will now be listed.

1. Respondent's requested Findings of Fact *conclusively established by public documents* are as follows: No. 3 by R. 118, and see Point II; No. 4 by Congressional Records cited in this brief, and Neptune, R. 157; No. 5 by Doc. 90, sec. 3, R. 119; No. 6 by R. 122-123; No. 7 by R. 144; No. 8 by R. 120; No. 9 by R. 143-144; No. 10 by R. 123; No. 11 by R. 124; No. 12 by R. 124; No. 13 by R. 124; No. 14 by R. 124; No. 15 by Doc. 90, sec. 134, p. 31; No. 16 by R. 126; No. 17 by R. 127; No. 18 by R. 128; No. 19 by R. 128; No. 20 by R. 127-129; No. 21 by R. 129-130; No. 24 by Doc. 90, sec. 118, R. 124, and Doc. 798, R. 138, 139; No. 26 by R. 138, also Wonson, R. 169; No. 27 by R. 139; No. 28 by R. 146, and R. 250; No. 29 by R. 140-141; No. 31 by Title 33 U. S. C. A. secs. 641, 647, 648, 701, 702, R. 132; No. 43 by Congressional Records herein cited; No. 78 by Doc. 90, secs. 69, 70 and 71, R. 248, and see Point VII; and No. 92 by Doc. 90, secs. 8 and 23, R. 120, and sec. 121, R. 124. These are more easily checked in the study of Point I.

The foregoing Findings of Fact, of which the Court must take judicial notice (see Point I), establish *liability*

actually had a market value of \$100 per acre at the time she bought it in 1927 *notwithstanding all tax and assessment burdens to which it had been subjected*. Improved agricultural lands in the vicinity of respondent's property were then readily selling at from \$100 to \$150 per acre subject to the identical tax burdens and bonded indebtednesses which remained on the lands after their values were destroyed following the Flood Control Act of May 15, 1928. Lands *not in a floodway* that produce a bale of cotton per acre easily bear the tax and assessment burden to which respondent's property is subjected. *There has been no change in that tax and assessment burden since respondent bought her property*. Market values changed violently and suddenly upon the creation of the floodway, with no change in tax burdens. The District Court erred in not finding as requested: "Much testimony was offered relative to the *tax burden and bonded indebtedness* of much of the area affected by the Boeuf Floodway. This evidence is immaterial as to the petitioner's (now respondent) property, and merely tends to confuse the issue. *No tax burden has increased since the petitioner bought her property January 20, 1927. No bonded indebtedness affecting this property has been increased since petitioner bought her property*. Petitioner's property had a fair market value of \$125 per acre *notwithstanding its tax burden and the bonded indebtedness affecting it*. Had the tax burden been substantially lower the market value would probably have been higher, but no part of the loss of market value hereinabove referred to can be justly attributed to the tax burden or bonded indebtedness affecting the property. *The values mentioned actually existed in spite of those burdens, and the market*

value of petitioner's property was lost *regardless of those burdens*" (R. 322-323). *Res ipsa loquitur*.

*"No part of the plaintiff's loss of market value can be attributed to the bonded indebtedness or taxes and assessments against her land. There has been no change in the tax burden since the plaintiff bought her land in 1927. The market value of plaintiff's land in 1927 existed notwithstanding the tax burden in which there has been no change except to lower assessments"* (Hopson R. 188).

*"The tax burden on plaintiff's 40 acres of land is not more than \$40 a year. A dollar an acre on this land would not affect its value at all because that is low taxation. Lands in production can carry the burden easily. The market value of plaintiff's property to which I have testified existed in spite of its tax burden. No indebtedness whatsoever has been added to it since it was put in the floodway. The annual tax burden has recently been lessened in Cypress Creek Drainage District by a refunding program. The loss in market value of plaintiff's property occurred on account of the passage of the Flood Control Act of May 15, 1928, adopting what we call the Jadwin Plan (Baxter, R. 192).*

*"We have had the same tax burden on these lands for years while the market values have been increasing. No bonds have been issued in the territory since 1927. The plaintiff has paid her taxes all along up to date. Notwithstanding the tax burden, the cleared land in this area had an actual market value of from \$100 to \$125 per acre just before it was put in the floodway"* (Parker, R. 199).

*"High taxes and bonded indebtedness has been on the land before and did not affect it up until the time it was put*

Therefore there can be no fair comparison between the decision in the *Matthews* case and in the case at bar. They are *not* in conflict, direct or otherwise.

The words of Judge Hamilton in his dissenting opinion in *Franklin v. United States*, 101 F. (2d) 459 at pp. 465-466, are peculiarly applicable to the facts in the case at bar, viz:

"All general statements in opinions of courts that acts done in the proper exercise of governmental powers and *not directly encroaching upon private property*, though their consequences may impair its use, are not a taking within the meaning of the constitutional provision and do not entitle the owner to compensation, must be read in the light of *the facts peculiar to each case*, and when this is done, *there are no conflicts in judicial pronouncements.*"

"According to the allegations of appellants' (in this case respondent's) pleadings, their lands did not lie within the dangerous flood area of the Mississippi River and its taking was not a contribution to public use *which brought to them an equal benefit* but they were required to contribute more than their share for the public good. *This is inequality, the antithesis of justice.*"

7. *Franklin v. United States*, (No. 845 this Court) 101 F. (2d) 459. This *Franklin* case is in no sense equi-parant with the case at bar. It does not involve the *flood control responsibility* for the first time deliberately and purposely assumed by the United States by the passage of the Flood Control Act of May 15, 1928 (See Points IV and V, B of this Brief).

The opinion merely reiterates the well established rule that:



"The construction by the United States of dikes on the bank and in the bed of the Mississippi River for the purpose of changing current to improve *navigation*, which resulted after a year in washing away of plaintiff's land on the opposite side of the river, was not a compensable 'appropriation' of plaintiff's property within purview of the Fifth Amendment."

The Court cites the well known line of decisions which have always held: "*Riparian* ownership is subject to the obligation to suffer the consequences of the improvement of *navigation* in the exercise of the dominant right of the government in that regard," \* \* \* "for the owner's title was in its very nature *subject to that use* in the interest of public *navigation*." 101 F. (2d) 459 at p. 461.

No such point is involved in the instant case.

The opinion of the Circuit Court of Appeals shows thorough familiarity with the decisions upon which petitioner relies, and, we submit, is convincing in its conclusion that none of those decisions are applicable to the peculiar facts of the instant case. 101 F. (2d) 506.

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headwater from the tributary St. John's Bayou every time either of those streams reached flood stage of sufficient elevation to inundate this low lying adjacent land. This area is distinguished on the Army Engineer Map by *dark green*—the same color which is used on the area lying along the river channel *between* the levees. The Flood Control Act of May 15, 1928, could not, and *did not*, undertake to protect these *dark green* areas on the map which lie between the levee lines and in these *back-water areas* where natural streams empty into the Mississippi River, the mouths of which could not be closed (R. 260). These back-water areas which the Act did not propose to materially affect one way or the other are found on the map (1) at the mouth of Red River in Louisiana, (2) at the mouth of Yazoo River in Mississippi, (3) at the mouths of Arkansas and White Rivers in Arkansas, (4) at the mouth of the St. Francis River in Arkansas, and (5) at the mouth of St. John's Bayou in Missouri in which the Matthews lands were located (R. 260).

Therefore, in the *Matthews* case the Court of Claims found as an ultimate fact:

*"Plaintiff's land has been subject to complete inundation by backwater and headwaters without any cutting down or reduction by the United States in the height of the river-side levee. As shown in the findings, all of plaintiff's land lies within the backwater area of the Birds Point-New Madrid Floodway." \* \* \**

"The record justifies the conclusion that if the river-side levee was high enough and strong enough to afford complete protection against overtopping and crevassing at 58 feet on the Cairo gauge 100 per cent of plaintiff's land would be overflowed by backwater at a stage of 58 feet.

"The evidence of record does not establish that any additional headwater flowing over plaintiff's land by reason of the cutting down or reduction by the defendant of a section of the riverside levee near Birds Point to a grade equivalent to 55 feet on the Cairo gauge will injure, damage or place upon plaintiff's timber, or land a substantial burden or servitude *to any greater extent than the timber and land have heretofore suffered*, or that the creation of such spillway, through the reduction in height of a portion of the riverside levee, will actually deprive plaintiff of any valuable property rights which he heretofore enjoyed and possessed in the land and timber." 87 C. Cls. 662.

This ultimate fact as declared in the opinion is supported by the special findings of the Court to the effect that under the provisions of the 1928 Act the Matthews lands would be submerged by *natural back-water* from the Mississippi River through St. John's Bayou *before* the Birds Point spillway would begin to function. Hence, any headwater which came to the Matthews land from the upper end of the Birds Point Floodway would find those lands *already under water*, and could inflict no additional damage.

*No such comparable condition exists in the case at bar.* As is shown by the Army Engineer Map, the respondent's land lies in *no back-water area*. On the contrary it lies side by side with the county seat itself in an area of fast, sound land which had long since been reclaimed from the primeval bed of the Mississippi River (if in fact it was ever in it), and which at the time of the passage of the Flood Control Act of May 15, 1928, was *completely protected* from flood waters from the Mississippi River.

## POINT XI.

## COMPENSATION. The Law. The Facts.

*Justice delayed is justice denied.* The record in this case is complete. The case is fully developed. *All* the evidence is before this Court. Respondent has already been unfairly impoverished by this tremendously expensive litigation. An humble citizen seeking the enforcement of a simple constitutional right is crushed by the costs, delays and the unlimited resources of a powerful Government. Remanding for further trial may well complete her utter economic annihilation. Any reasonable view of *all* the evidence requires final judgment for respondent, without further futile cost or delay. She has been already entitled to this relief *for more than 5 years*. Therefore respondent pitiously prays, and earnestly urges, either that final judgment be entered for her in this Court on the entire record, or that the case be remanded with specific direction to render judgment for respondent as prayed (R. 16). To support which, respondent respectfully submits the remainder of this brief, as follows:

1. Every pertinent phase of the **LAW** supporting every requested Conclusion of Law on the subject of Compensation is hereinafter presented in orderly arrangement. See Subject Index to this point.

Here suffice it to summarize that the just compensation to which respondent is constitutionally entitled is the market value of her property "*at the time of the taking contemporaneously paid in money.*" It does *not* include any element either augmenting or reducing the compensation *resulting subsequently to the taking.* The highest and

most profitable use for which the property is adaptable and needed, or likely to be needed, in the reasonably near future, is to be considered to the extent that the prospects of demand for such use affects the market value when the property is privately held. This measure of compensation for flowage easement is definitely and particularly settled by this Court in the case of *Olson v. United States* (*Brewster v. United States*), 292-U. S. 246, 54 S. Ct. 704, 78 L. ed. 1236 (affirming—C.C.A. 8th,—67 F. (2d) 24; 106 A. L. R. 961).

The compensation, or measure of damage, is the difference between the fair, reasonable market value of the whole farm as it stood on the date of the appropriation and the fair, reasonable market value after the appropriation, in its then condition. The only safe rule is to inquire what the property unaffected by the floodway easement would have sold for immediately prior to its dedication as a floodway, and what it would sell for as affected by the floodway. The "just compensation" is the decrease in the market value of respondent's land, considered as a whole, by reason of the detriment to it as a whole consequent upon the servitude impressed, and resulting from the construction work done under the authority of the Flood Control Act of May 15, 1928. *Olson v. United States*, *supra*; *United States v. Chicago, Burlington & Quincy Railroad Company*, (C.C.A. 8th) 82 F. (2d) 131, 106 A. L. R. 942, certiorari denied 298 U. S. 689, 56 S. Ct. 957, 80 L. ed. 1408; Annotation 106 A. L. R. 935, and at p. 959. The testimony is without substantial contradiction on this point.



amount of damages or determine the amount of the "compensation" required by the Fifth Amendment.

The applicable rules of practice on this point on the record in the instant case are probably the following:

The appellate court will review the findings of the lower court as to the particular facts:

(1). "Where *conclusions of law* and *findings of fact* are so *intermingled* as to make it necessary to analyze the facts in order to pass upon the question."

*Truax v. Corrigan*, 257 U. S. 312, 325, 42 S. Ct. 124, 27 A. L. R. 375, 66 L. ed. 254, at p. 260.

*Fiske v. Kansas*, 274 U. S. 380, 385, 47 S. Ct. 655, 71 L. ed. 1108, at p. 1111.

(2). "Where it is insisted that a Federal right has been denied as the result of a finding of fact which is without support in the evidence, and the evidence is before the Court in the record by which the insistence may be tested, and it appears that there is a mixed question of law and fact, it is incumbent upon the court to analyze the evidence to the extent necessary to give the plaintiff in error the benefit of the asserted Federal right."

*Sputhern Pacific Co. v. Schuyler*, 227 U. S. 601, 611, 33 S. Ct. 277, 57 L. ed. 662, at p. 669.

*Fiske v. Kansas*, 274 U. S. 380, 385, 47 S. Ct. 655, 71 L. ed. 1108, 1111.

(3). "Where the record contains all the testimony upon which the Judges' findings of fact are based, the appellate court may determine whether such findings are supported by competent evidence, and, if they are not, reverse the judgment. *Collier v. United States*, 173 U. S. 79, 19 S. Ct. 330, 43 L. ed. 621, at p. 622; *United States v. Clark*, 96 U. S. 40, 6 Otto 37, 24 L. ed. 696, at p. 698.

(4). "In all Acts of Congress regulating judicial proceedings, the word '*appeal*,' unless restricted by the context, indicates that the *facts*, as well as the *law*, involved in the judgment below, may be reviewed in the Appellate Court."

*Capitol Traction Company v. Hoff*, 174 U. S. 1, 37, 19 S. Ct. 580, 43 L. ed. 873, at p. 886.

The Circuit Court of Appeals was infallibly right in its self-evident findings and conclusions on the record before it.

6. *Matthews v. United States*, 87 C.° Cls. 662. The facts in this *Matthews* case are not at all analogous to those in the case at bar. Counsel are in error in suggesting "There is no distinction in principle between the two cases" (Petition for Certiorari, p. 21). The principles upon which respondent herein relies were not applicable to the ultimate facts found by the Court of Claims to exist in the *Matthews* case.

By referring to the official Map of the "Plan of the Army Engineers for Flood Control, adopted by the Act of May 15, 1928," it will be seen that the *wild, timber* lands involved in the *Matthews* case lie, and have always been, in the "*back-water*" area of the Mississippi River in the basin of St. John's Bayou. This means that *before the Government did anything* every time the Mississippi River overflowed its natural banks in that latitude the water escaped from the Mississippi River through the *natural outlet* of the mouth of St. John's Bayou, and backed up this bayou so as to overflow the claimant's lands. When the Flood Control Act of 1928 was passed, as well as before and since alike, this area was *naturally* subject to floods from the *back-water* of the Mississippi River and

ed. 621; *United States v. Buffalo Pitts Company*, 234 U. S. 228, 34 S. Ct. 840, 58 L. ed. 1290, 1292."

<sup>A</sup> *Wessel v. United States*, 49 F. (2d) 137 at p. 139.

Moreover, in this case petitioner's proposition is entirely academic and moot, and all similar authorities are entirely beside the point. Here there is no conflict in the evidence as to *a single material physical fact*. Every essential, underlying fact necessary to establish liability as alleged in respondent's Petition is undisputed. These material physical facts are immutably fixed by the official PUBLIC DOCUMENTS referred to in respondent's brief. See Point I.

Petitioner requests that this Court shut its eyes "to the plainest facts of our national life and to deal with the question in an intellectual vacuum." This the Supreme Court declines to do. *National Labor Relations Board v. Jones and Laughlin Steel Corporation*, 301 U. S. 1, 81 L. ed. 893, at p. 914.

The only conflicts and confusion in the instant case lie in:

- (1) *Conclusions of Law*, upon which this Court will reach its own independent judgment; and
- (2) Inconclusive *opinions* of so-called expert engineers, based on undisputed physical facts, and prognostic conclusions—fantastic prophecies of the future.

"Expert opinions are controlling only in so far as they are found to be reasonable. . . . No rule of law compels (a court) to give a controlling influence to opinions of experts, or to surrender his own judgment."

*The Conqueror*, 166 U. S. 110, 131, 133; 41 L. ed. 937, 947.

*Aetna Life Insurance Company v. Ward*, 140 U. S. 76, 88; 35 L. ed. 371.

*Head v. Hargrave*, 105 U. S. 45, 49; 26 L. ed. 1028.

*Dayton Power & Light Company v. Public Utilities Commission*, 292 U. S. 290, 299; 78 L. ed. 1267, at p. 1275.

Incredible testimony, though uncontradicted, is not accepted by a Court. *Reis v. Reardon*, (8 C.C.A.), 18 Fed. (2d) 200, at p. 202.

Petitioner's authorities on this point are not apt.

This is not a law case where a jury was waived. No jury is possible under the Tucker Act (Title 28, U.S.C.A., Sec. 41 (20)). The Findings in this case are more nearly like the Findings in a suit in equity which "may be revised by the appellate court if they are against the weight of the evidence." *Morley Construction Company v. Maryland Casualty Company*, 300 U. S. 185, 57 S. Ct. 325, 81 L. ed. 593; *Dodge v. Knowles*, 114 U. S. 430, 5 S. Ct. 1108, 29 L. ed. 144, 146; *Johnson v. Harmon*, 94 U. S. 371, 24 L. ed. 271.

But even in law cases, and with jury trials, "*A finding in the nature of a legal conclusion is reviewable.*"

*Houston & T. C. R. Co. v. Texas*, 177 U. S. 66, 80, 20 S. Ct. 545, 44 L. ed. 673, 681.

*The Britannia v. Cleugh*, 153 U. S. 130, 141, 14 S. Ct. 795, 38 L. ed. 660, 664.

In this case, the issue of *liability* was purely one of *law*. On the record made, it would have been the duty of the trial Court to have instructed the jury that under the undisputed physical facts and laws involved the respondent's "property" (*not land*) was "taken," and the only possible duty of a jury could have been to assess the

sel for petitioner in the case at bar, that the United States is not responsible for returning the water of the river "to its ancient bed." After refuting that erroneous statement in detail, Chief Justice White closes the opinion of the court by stating: " \* \* \* when the principle laid down in the *Jackson* case is illustrated by the ruling which was made in the *Hughes* case, it becomes apparent that the contention here urged as to the identity between the great valley and the flood bed of the river was adversely disposed of, since under no view could the ruling in the *Hughes* case have been made except upon the theory that the bank of the river was where it was found, and *did not extend over a vast and imaginary area.*" 60 L. ed. 1049.

At least one other former, judicial principle announced in *Jackson v. United States*, 230 U. S. 1, 33 S. Ct. 1011, 57 L. ed. 1363, is expressly repealed and reversed by the proviso of section 3 of the Flood Control Act of May 15, 1928, which reads: "*Provided, however, that if in carrying out the purposes of sections 702a to 702m of this title it shall be found that upon any stretch of the banks of the Mississippi River it is impracticable to construct levees, either because such construction is not economically justified or because such construction would unreasonably restrict the flood channel, and lands in such stretch of the river are subjected to overflow and damage which are not now overflowed or damaged by reason of the construction of levees on the opposite banks of the river it shall be the duty of the Secretary of War and the Chief of Engineers to institute proceedings on behalf of the United States Government to acquire either the absolute ownership of the lands so subjected to overflow and damage or floodage rights over such lands.*" Title 33, U.S.C.A., sec. 702c.



*Hughes v. United States, supra*, also decided twenty-six (26) years ago, expressly distinguishes itself from the case at bar by stating: (1) "The acts of Congress but authorized an improvement of *navigation*, and empowered expenditures for that purpose," there being no thought on the part of the Government at that time of assuming a responsibility for flood control; and (2) "There is no pretense of any *intention* to injure the claimant by the building of the new levee"; and (3) The destroying of claimant's levee (protection) by the United States engineers was a *tort*, not being authorized; and (4) The claimant's *right to self-defense had not been taken*. The court explained that under the law then existing: "The facts just stated serve to demonstrate the error which was committed in deciding that the exertion of national power to build levees for improving *navigation* had effaced the exercise of State power to construct levees for protection from overflow, \* \* \*." 57 L. ed. 1378.

3. *Harbor line cases*. In *Willink v. United States*, 240 U. S. 572, 36 S. Ct. 422, 60 L. ed. 808, the property involved was below the mean high-water line and was within the harbor area over which the United States had complete constitutional control for the purpose of navigation. Therefore, under the facts in that case, the court was clearly right in holding that "no right of his (the claimant) was infringed. The river being navigable and tidal, whatever rights he possessed in the land below the mean high-water line were subordinate to the public right of navigation and to the power of Congress to employ all appropriate means to keep the river open and its navigation unobstructed. \* \* \* Such inconvenience and damage as he (claimant) sustained resulted *not* from a taking of his

property, but from the lawful exercise of a power to which it had always been subject." 60 L. ed. at pp. 810-811. This state of facts bears not the slightest analogy to the situation of the respondent, and her land, in the case at bar. "It has also been recognized that a different question arises when active measures are taken against an individual proprietor to maintain a location of limits in alleged violation of his *private rights*, and thus to prevent him from enjoying what is asserted to be the lawful use of his *property*." *Philadelphia Co. v. Stimson*, 223 U. S. 605, 32 S. Ct. 340, 56 L. ed. 570, at p. 578. So with all the harbor line cases.

Similarly every other case which petitioner may cite will, on careful study and analysis, be readily distinguished by the court from the peculiar facts and the statutory edict involved in the case at bar, as was done by the Circuit Court of Appeals.

"*The constitutionality of the Flood Control Act of May 15, 1928, is hereby expressly admitted.*" See *Kohl v. United States*, 91 U. S. 367, 23 L. ed. 449; *Hurley v. Kincaid*, 285 U. S. 95, 52 S. Ct. 267, 76 L. ed. 637.

4. Re: CONSEQUENTIAL DAMAGES. *Bedford v. United States*, 192 U. S. 217, 24 S. Ct. 238, 48 L. ed. 414; *Gibson v. United States*, 166 U. S. 269, 17 S. Ct. 578, 41 L. ed. 996, and numerous similar cases which petitioner cites, are all cases of *incidental, unanticipated, unintentional, un-contemplated, or consequential damages* only, as distinguished from "*a taking*" of property as illustrated by the authorities on which appellant relies. See Point V, B. and D.

In the *Bedford* case decided 35 years ago, as a fair sample of petitioner's authorities, it was shown: (1) The work done by the Government "did not change the course of the river as it then existed, but operated to prevent further changes"; and (2) "To what extent the injury would have been decreased is conjectural"; and (3) "The injury done to the claimants' land was the effect of *natural causes*"; and (4). The work involved was strictly in aid of *navigation*, there having been at that time no thought of Government responsibility for flood control.

So also will a study of any case cited by petitioner in support of its argument that only consequential damages are involved in the case at bar readily distinguish itself from the facts of the instant case.

5. *Weight of the Findings of the District Court.* Petitioner cites *Wessel v. United States*, 49 F. (2d) 137, 139 (C.C.A. 8th), and *United States v. Gamble-Skogmo*, 91 F. (2d) 372, 374 (C.C.A. 8th) in support of its proposition that the findings of the trial court as to the facts are controlling when reasonably supported by substantial evidence (Petition for Certiorari, p. 16).

We first notice that these decisions are by the same Circuit Court of Appeals from which the instant appeal is taken. That court is doubtless thoroughly familiar with the full extent of its own rules of practice and decisions.

"If the question of whether or not there is any substantial evidence to support the findings of fact was properly raised at the trial and preserved for review by this court, we are satisfied that *it is our duty to pass on that question as one of law*; all the evidence being before us. *Collier v. United States*, 173 U. S. 79, 19 S. Ct. 330, 43 L.

Mississippi River on a piece of land you are going to damage that land. We all know that. *I do not think the Jadwin Plan will be used.* I don't think you can make people believe that there is a threat to turn the river on our land" (Cain, R. 213-214).

We wonder who so instructed this witness?

(3) "I live in Chicot County. We have never handled any lands in Desha County. I would absolutely oppose any floodway that would endanger our property. *The Jadwin Plan has been abandoned.* I base my testimony and conclusions on this premise that the Jadwin Plan has been abandoned and *I know we are not in the floodway.*

• • • This threat of being flooded scares people to death. It had not a particle of effect on the market value of the lands. If the Arkansas and White Rivers had been in flood stage in 1927, when the crest of the Ohio River flood came down I still think *we would have been protected* in our community because the Government can come in there and help the 800 or 900 men and *build up the fuse plug levee 3 or 4 feet higher, and take the water down the river past Chicot County. I believe the Government Engineers would build up this levee with bags of dirt to hold the water 4 or 5 feet above the levee if necessary.* • • • *We have never yet actually been in a floodway as a result of the construction work done by the Government.* • • • *We would never have a spillway.* I don't think the spillway has ever been in operative condition" (Davis, R. 214-216).

(4) "I live in Chicot County. *I am not familiar with Desha County nor the flowage rights there as covered by the Jadwin Plan.* • • • My testimony is based on my un-

derstanding that the country to which I refer has never actually been in any floodway yet" (Moore, R. 220-221).

(5) "I live in Chicot County. *The market value of my land* took a drop about 1921 because of high taxes for drainage and levee purposes. I recall the floods of 1912, 1913, 1916 and 1927. The 1927 flood was the biggest flood we ever had. It was not destructive or damaging to any great extent. \* \* \* *I had rather have land inside the floodway than outside* because overflows deposit soil and makes the land better" (McGehee, R. 221).

Witness' land in Chicot County may have dropped in value in 1921, but respondent's land in Desha County was selling for \$125 an acre in 1927. Nor would respondent, or the average buyer of a farm, prefer to have his farm between the levees of the Mississippi River, or inside the floodway of the Mississippi River, because that mighty stream deposits soil, silt, sand bars, debris and what you will when its wild rampage is over.

(6) "I live in Chicot County. I am *not familiar* with any particular farm land or place in Desha County, nor with the plaintiff's land involved in this lawsuit. In my opinion all of the lands in the alluvial valley of the Mississippi River in Southeast Arkansas and the State of Mississippi and in Louisiana *are equally subject to flood*. I do not understand that the property has ever actually been in any existing potential floodway as designated by the Flood Control Act of May 15, 1928. Seventy-five per cent of the people in Chicot County do not believe the Jadwin Plan would ever be perfected. In my opinion it never has been and never will be. *My testimony relative to how values have been affected by the floodway are based*



*on the assumption that the floodway has never actually been put into operative condition. If this levee of the 1928 Act had been made, and it looked like a sure fact that this whole Boeuf Basin Floodway was going to be swept and flooded, then I wouldn't want land in that spillway"* (Dabney, R. 221-223).

(7) *"I live in Chicot County. I understand that the fuse plug of the Jadwin Plan, in front of the area I have referred to as the Boeuf Floodway, has not been completed, and the Boeuf Floodway has never been in an operative condition. \* \* \* Land in a floodway would not have as much value as land of the same type and character outside of the floodway where it is protected"* (Holland, R. 223-224).

(8) *"I am a city mail carrier. I bought 120 acres of land in the Boeuf Floodway about 1933, and have got most of it in cultivation since I bought it. \* \* \* If the Government exercises its right to overflow my land, I expect \$100 an acre for damage to my cultivated land and \$25 an acre for the wood land"* (Farrell, R. 225).

(9) *"I am not familiar with the floodway area of the country and never go down there. I am not familiar with the value of land in the floodway"* (Cox, R. 225).

(10) *"I know nothing about the character or conditions of land in Desha County prior to the time I got there in 1930. I don't know anything about that spillway. If that land had flood protection I think it would be worth at least \$200 an acre"* (Stewart, R. 226).

(11) *"I do not own any land affected by the fuse plug levee nbr in the floodway. I do not think the pas-*

sage of the Flood Control Act of 1928 affected the market values of farm lands in the *territory around Dumas*, about 30 miles from *Arkansas City*. I am a druggist" (Meador, R. 226-227).

(12) "In 1930 I bought a little land near Watson. *It is not in the Boeuf Floodway*. My lands were overflowed from the Arkansas River in 1927, but are now protected by the 1928 grade and section levees which have been built on the South bank of the Arkansas River" (Rana, R. 227).

(13). "I have been approached to be one of the appraisers for flowage rights in Desha County. I have recently bought very fine land that cost me anywhere from \$1 to \$10 an acre in the woods. I have developed the land myself. I do not know when the plaintiff bought her land. If she paid \$100 an acre for it in 1927 I think she paid the fair market value. *My idea is that the Boeuf Floodway as designed by the Flood Control Act of May 15, 1928, has never become operative*. I have never considered what would be the fair damage to land if the floodway ever becomes in a condition to actually function as a floodway because I never did think the original plan would go through" (Gould, R. 227-228).

(14) "We took statements of Mr. Cain, Mr. Rana, Mr. Meador, Mr. Davis and Mr. Holland, who have testified, *on a boat in the Mississippi River, in the presence of certain Government Engineers and attorneys*. I have not told any of these witnesses that the Boeuf Floodway under the Jadwin Plan had been abandoned" (Kirten, petitioner's attorney, R. 228).

with easy access to an adjacent thriving market and good schools. *No witness* has suggested that there was any more attractive or valuable 40 acres of land for farming purposes in the entire alluvial valley of the Mississippi River. *No witness* dared deny that during the year 1929, after it was generally known that this land was in the Boeuf Floodway, and while the rest of the country was enjoying the peak of prosperity when respondent had the right to sell her land at peak values, respondent's land in fact *then* had practically *no market value*.

Therefore, when the Court examines the record of *all* of the testimony anent the amount of just compensation to which respondent is entitled, and carefully analyzes its purport, *competency* and weight, we are sanguine in the confidence that this Court will conclude that *respondent's evidence on this point stands substantially undisputed and uncontradicted*.

(b) *Petitioner's Incompetent Evidence*. The rules of law which qualify a witness to testify as to values are simple, clear and well established. "*After a witness has testified that he knows the property and its value, he may be called upon to state such value.*" ORGEL on VALUATION under EMINENT DOMAIN, p. 444, Note 50, and decisions *passim*. See Subject Index of this brief, Point XI, 3, "Evidence anent Values."

Measured by this simple standard, *petitioner offered no qualified witness* on the issue of the amount of respondent's award. Presumably it could find none to dispute the truth of respondent's testimony.

The Government did offer a number of witnesses who testified about values in *Chicot County* of lands wholly in-

*comparable* to respondent's property. The property values discussed by most of the witnesses involved *remote lands at remote times*. Some of the witnesses had been actually approached by the Government for employment for the very purpose of securing flowage rights at the lowest possible cost. In an effort to create the impression of an active market, they testify of a vast influx of "donators" and "squatters" who swarmed into the area as hungry vultures over the wreckage of values destroyed by the Flood Control Act of May 15, 1928, hoping the Court would believe therefrom that values in the area had been greatly increased as the result of a rapidly swelling population. Petitioner was not fair enough to state *at what price* the market existed. The record is clear that these insolvent donators were buying forfeited tax titles from the State at \$1 per acre. The record is undisputed that lands adjoining respondent's property which had been worth from \$40 to \$50 an acre before put in the floodway were actually so sold at \$1 per acre. Lands which had been worth from \$100 to \$125 an acre before being sacrificed for a floodway were sold after the "taking" for \$10 to \$15 an acre. Yes, after the creation of the Boeuf Floodway, a market was created by the squatters who preyed upon the economic wreckage as ghouls upon the dead—a market existed but **AT WHAT A PRICE!**

(c) *False Premises*. But the most astounding fact disclosed by an examination of petitioner's testimony, which *completely destroys its evidentiary value*, is the frank admission of the witnesses that their testimony is based upon *three definitely false premises*. A false premise necessarily results in a false conclusion. These three premises, false in fact and law, upon which petitioner in-

duced its witnesses to rely, are: (1) that the Boeuf Floodway has never yet been created, and (2) that the Army Engineers will never permit the fuse plug levee to crevasse during a flood, and (3) that there is no occasion for present alarm because the United States will undoubtedly pay all actual damages sustained if, as and when the Boeuf Floodway is ever used. Of what possible value can be the opinion of such hopelessly misinformed witnesses? *Falsus in uno, falsus in omnibus.*

No argument is necessary to convince this Court that any witness who testifies that the placing of property in a floodway designed to flow 1,250,000 cubic second-feet of water, a volume more than six times the flow of Niagara Falls (R. 146), has no effect upon its market value, and that the witness had just as soon have his home within as without such a floodway, is either pitifully uninformed, or else a deliberate scoundrel, and in either case altogether incredible. No witness so testifying could understand that the fuse plug levee, as a matter of law, was created expressly "*TO INSURE that excess water will leave the main river*" at that point (Doc. 90, sec. 118, R. 124) in order to give complete protection to "the remainder of the alluvial valley" (Doc. 90, sec. 121, R. 124).

Proof of (a), (b) and (c), of this Point, absolute and unequivocal, is found in the record as follows:

(1) "I live in Chicot County. I do not know the plaintiff's land and am unable to compare the market value of the plaintiff's land with the Mason Lake place . . . . Damn it, no sir, I don't think it has been damaged by being in the floodway. . . . I think the War Department will hold that levee there. . . . I would think



*they would go ahead and fight against the Mississippi side.*

\* \* \* *If the Government stands there and lets that fuse plug go out I think the Government would pay all the damage done. \* \* \* If they let water get in the floodway under the Markham Plan I think the flowage rights are worth something. It would change the fuse plug levee. I have been approached by the Government to enlist my services as an appraiser of the flowage rights that the Government is seeking in the floodway"* (Matthews, R. 210-212).

Could any assumed premises be more completely erroneous, resulting in any conclusion more valueless?

(2) *"I live in Chicot County. I have never lived in Desha County. I am not familiar with market values in Desha County prior to 1927. I did not pay any cash for the lands I bought in Arkansas in 1927 but just assumed the mortgage debt. \* \* \* I had just as soon have land in the floodway as out of the floodway because after they have completed the floodway these lands in the floodway are going to be paid a reasonable price for it, and we will have more protection than the others on the outside. If the Government takes any of my land to use it in a spillway I expect to pay for it. I do not feel that my land is in either one of the spillways. I feel like I am only in the proposed spillway. We have been protected. I had some conferences with the Army Engineers at Vicksburg. My statement that the floodway has had no effect on the market value of my land is based first on the fact that I do not think we are yet in any operative spillway, and second when we get in an operative spillway and my property is actually damaged the Government will compensate me. That is the way I feel about it. Any time you turn the*

on the War Department \* \* \*. Those people have still got their case in court under section 4 of the 1928 Act" (Col. Graves, May 1, 1936, R. 148, 149).

*"The Government has built levees, and under its right of eminent domain has taken levees, for the purpose of diverting waters over lands heretofore protected from flood waters \* \* \*. The taking of such lands and property has destroyed values"* (Arkansas General Assembly, March 6, 1935, R. 152-153).

Regardless of what happened elsewhere, there cannot be the slightest reasonable doubt but that the respondent actually paid \$100 per acre for her forty acres of land on January 10, 1927, (R. 180), thereafter placed upon it improvements to the value of \$25 per acre (R. 182), giving it a total fair market value of \$125 per acre immediately before it was placed by the Government in the Boeuf Floodway (R. 181); and that immediately after it became generally known that it was in the Boeuf Floodway as created by the Flood Control Act of May 15, 1928, it could not have been sold for more than \$10 or \$15 per acre (R. 180); and that this actual loss of \$100 per acre continued, while the depression came and went, to the date of trial (R. 180). This loss is solely attributable to the Flood Control Act of May 15, 1928, (Sponenbarger, R. 179-182; Hopson, R. 185; Baxter, R. 192; Thompson, R. 195; Parker, R. 197; Clayton, R. 201; Zellner, R. 202; Neal, R. 203; Courtney, R. 204; T. A. Prewitt, R. 205; Mann, R. 206; B. C. Prewitt, R. 207; Matthews, R. 208; Zebold, R. 210; Whittaker, R. 266; Harris, R. 266-267; Snyder, R. 268; Riley, R. 269; Mrs. Courtney, R. 269; Furlong, R. 269-270; Price, R. 270).

Each of these witnesses qualified by testifying to long *personal familiarity* with respondent's identical *40 acres of land involved in this suit*, and with actual sales and market values in that *immediate vicinity*. Their testimony related to *this particular land*, and its market value *immediately before and after its taking* by the Government for a floodway. Each of respondent's witnesses qualified squarely within the rules of competency as announced by all the authorities.

*Petitioner's lay testimony on values*, on the contrary, violated all of the rules of competency and is most amazing in its utter incredibility. There is absolutely *no substantial contradiction* to respondent's testimony establishing her loss.

(a) Not a single reputable witness, *qualified to testify*, disputed the overwhelming mass of testimony offered by respondent fixing her measure of damages at approximately \$100 an acre, to which transcript references have just been given above. Most of petitioner's witnesses admitted frankly that they *had never seen respondent's property* and *knew practically nothing about it or its value*. *No witness* testified that respondent did not in fact pay \$100 an acre for her property in January, 1927. *No witness* disputed the fact that immediately thereafter respondent spent \$25 an acre in buildings and improvements on the property. *No witness* testified that respondent paid more for her property than its fair market value at the time of its purchase. *No witness* denied that respondent's 40 acres of land was outstanding and unique in its value because of its unusual fertility, its excellent drainage, its commanding location on an interstate improved highway

**Respondent's Right to Recover SANS CONDEMNATION  
Proceedings by the Secretary of War.**

Section 4 of the Flood Control Act of May 15, 1928, authorizes the Secretary of War, in his discretion, to cause proceedings to be instituted for the acquirement by condemnation of any lands, easements, rights-of-way, or flowage rights which may be needed in carrying out the adopted project (Jadwin Plan); but the failure of the Secretary of War to exercise this right of condemnation does not destroy, or in any way impair, respondent's right to recover in her present action.

"The fact that the condemnation proceedings were not instituted and that the right was asserted in suits by the owners did not change the essential nature of the claim. The form of the remedy did not qualify the right. It rested upon the Fifth Amendment. Statutory recognition was not necessary. Such a promise was implied because of the duty to pay imposed by the Amendment. The suits were thus founded upon the Constitution of the United States. U. S. C. A. title 28, Sec. 41 (20)." *Jacobs v. United States*, 290 U. S. 13, 54 S. Ct. 26, 78 L. ed. 142.

In *United States v. Great Falls Manufacturing Company*, 112 U. S. 645, 5 S. Ct. 306, 28 L. ed. 846, the Court held:

"Where property to which the United States asserts no title is taken by its officers or agents pursuant to an Act of Congress, as private property, for public use, the Government is under an implied obligation to make just compensation to the owner.

"Such an implication being consistent with the constitutional duty of the Government, as well as with common

justice, the owner's claim for compensation is one arising out of implied contract, within the meaning of the statute defining the jurisdiction of the Court of Claims; *although there may have been no formal proceedings for the condemnation of the property to public use.*

"The owner may waive any objection he might be entitled to make, based upon the want of such formal proceedings and, electing to regard the action of the Government as a taking under its sovereign right of eminent domain, may demand just compensation for the property."

To the same effect are the decisions in *Roberts v. Northern Pacific Railroad Company*, 158 U. S. 1, 15 S. Ct. 756, 39 L. ed. 873; *Portsmouth Harbor Land & Hotel Company v. United States*, 260 U. S. 327, 330, 43 S. Ct. 135, 67 L. ed. 287; *Hurley v. Kincaid*, 285 U. S. 95, 52 S. Ct. 267, 76 L. ed. 637; *Jacobs v. United States*, 290 U. S. 13, 54 S. Ct. 26, 78 L. ed. 142, 143; *Great Falls Mfg. Co. v. Garland, Atty. Genl.*, 124 U. S. 581, 8 S. Ct. 631, 31 L. ed. 527; and *United States v. Lynah*, 188 U. S. 445, 23 S. Ct. 349, 47 L. ed. 539.

The foregoing authorities clearly establish the right of the respondent to maintain the present action regardless of the inaction of the Government's Department of Justice. The remedy of condemnation procedure, waived by the respondent, has necessarily become *functus officio*. The "taking" being now complete, and respondent having assented thereto by asserting her right to compensation, eliminates the essential facts requisite for jurisdiction in condemnation proceedings.

The constitutionality and validity of the Flood Control Act of May 15, 1928, is hereby expressly conceded.



While statutory evidence has been introduced showing the consent of the State of Arkansas to exercise all rights necessary to effectuate all Acts of Congress for the flood control of the Mississippi River (R. 156), this consent of the sovereign state was not necessary.

"The right of eminent domain may be exercised by the United States within the several states, so far as is necessary to the enjoyment of the powers conferred upon the United States by the constitution, and the consent of the State is not a condition precedent." 20 *Corpus Juris*, p. 530, Sec. 18, and numerous cases in footnotes 4 and 5.

2. The **FACTS**. The evidence is clear and overwhelming in establishing the amount of just compensation to which respondent is entitled in this case. The District Court erred in failing to adopt respondent's requested Finding of Fact No. 101 (R. 334) and Conclusions of Law Nos. 61 and 62 (R. 350), 24 (R. 339) and 17 (R. 337).

Petitioner's contention that the dedication of respondent's property as a part of the floor of the Boeuf Floodway, as a sacrifice to protect the balance of the alluvial valley, did not substantially destroy its market value is not only absurd, as a matter of common knowledge and common sense, but is also irreconcilably inconsistent with the official admissions of those authorized to speak for the United States. Certainly the Congress has spoken clearly enough. See Point V, B, 2.

"The War Department has the utmost sympathy for an owner whose property is injured without compensation. It believes that such owners deserve equitable treatment and compensation for flowage easements over their lands.

These are the same conclusions reached by the Committee on Flood Control after extensive hearings. \* \* \* For the reasons heretofore given, *as a matter of law and equity, the obligation rests upon the United States*" (Report No. 985, House of Representatives, May 23, 1935, R. 144-145).

"I cannot find, with our appraisals all through the areas of the Boeuf \* \* \* what in fact are *the values that have been destroyed* by use of these flood confinements—I cannot find that as an appraisal the amount of money involved is less than about \$205,000,000" (General Markham, Chief of Engineers, February 27, 1934, R. 140). General Markham then recommends the payment of 75% or 80% of the market value for flowage rights as being just compensation in the Eudora Floodway (R. 145-146, 147). "I repeat that a million second-feet *must* be taken out of that river unless you are going to have more and more disasters \* \* \*. The United States is proposing that instead of having a sporadic indefinable crevasse somewhere—and that is always what we have had in the past—we definitely put it down with prediction, *and pay the flowage for that purpose, and pay nearly the real value* of every foot that is traversed by that water in that determined path" (Gen. Markham, Jan. 27, 1936, R. 146-147). "We are physically, deliberately putting additional flood water down in a certain territory, and thus *deliberately creating an obligation for the acquirement of those flowage rights*" (General Markham, May 1, 1936, R. 150).

"The 1928 Act said that the United States shall provide flowage for the additional destructive flood waters that pass by reason of diversion from the main channel of the Mississippi River, and *that puts a burden indirectly*

are so unmarketable that an award of their market value would not constitute just compensation. No court, for instance, would sanction a purely nominal compensation for an easement which is of great value to its owner, merely because it could not be sold to anyone else for the price of the paper on which it is recorded. If an apportionment of the market value of the fee simple is to be criticized at all, it must be criticized on the ground that it cannot result in an approximation to *indemnity*, and not on the irrelevant ground that it cannot result in a distribution of the compensation equivalent to the separate market values of the divided interests." *ORGEL etc.*, p. 359, Sec. 106.

"The judicial system of valuing property acquired in eminent domain proceedings rests on the constitutional provisions that *no private property shall be taken for public use without just compensation*. The statutes enacted pursuant to these constitutional requirements have generally referred to the 'value' of the property taken as the measure of compensation. The judicial decisions, too, have accepted 'value' as the standard, rather than some other criterion, such as costs."

"What do these statutes and these judicial opinions mean by 'value'? While the constitutional provisions refer to 'just compensation,' many of the judicial opinions state that the measure of compensation is '*what has the owner lost?*' Other opinions indicate that *the owner should receive the equivalent of what has been taken from him*, while in still others the courts say that *just compensation requires that the owner be put in the same pecuniary position in which he was prior to the taking*." *ORGEL on VALUATION under EMINENT DOMAIN*, p. 808, Sec. 236.

### 3. Market Value at time of Taking.

Values of the respondent's property prior to 1927, and values thereof after 1929 are immaterial, and tend only to confuse the issue and prejudice her rights. The value, or lack of value, of other property remote from respondent's, of a different character and differently circumstanced, is of course wholly incompetent and highly prejudicial, misleading in the extreme.

On the question of compensation, and the amount of the judgment to be rendered by the Court in this action, the only question to determine is the fair market value of the respondent's property at the time of the alleged taking. Here there is no substantial conflict in the record. All other evidence in the case tending to show other values of disparate property at different times and places is incompetent, irrelevant, immaterial, confusing and prejudicial.

"The courts, however, have uniformly construed both of these forms of the 'just compensation' clauses as requiring, at the minimum, a compensation equivalent to the 'value' of the property 'taken,' determined as of the time of the taking." *ORGEL etc.*, p. 46.

"\* \* \* the phrase (market value) is highly ambiguous and is given a wide variety of meanings by both courts and economists. For the present purposes, the definition that suggests itself as most convenient is 'the price at which the owner might actually have sold the property at or about the time of the taking.'" *ORGEL etc.*, p. 51, Sec. 14.

"It is the invariable practice in eminent domain cases, to set a specific date as of which the property must be val-

to be taken, locate the public work and declare the appropriation, the owner becomes absolutely entitled to compensation, whether the public proceed at once to occupy the property or not."

*Cooley's Constitutional Limitations*, (7th Ed.) p. 818.

"The just compensation to which the owner of property taken for public purposes is constitutionally entitled is the market value of the property at the time of the taking contemporaneously paid in money."

*Olson v. United States*, 292 U. S. 246, 54 S. Ct. 704, 78 L. ed. 1236, 1237.

*United States v. New River Collieries Co.*, *supra*.

3. The "Compensation" must be based only on the Jadwin Plan.

Because the respondent was undoubtedly entitled to have her compensation based upon "*the market value of the property at the time of the taking contemporaneously paid in money*," it would be utterly illogical, and indefensible by any legal precedent, for the Court at this time to consider developments of any kind since the time of the alleged taking. Because of the rule of law just stated it necessarily follows that no change or modification of plans, no scientific discovery (especially such as the vague, undisclosed, esoteric, mysterious information about cut-offs which the Government's expert witness Mathis claims to be in the sole and exclusive possession of himself and associates at Vicksburg, R. 290), no changed condition of any kind or character, nor any other fact at the time of the taking unknown to the parties, can possibly be properly considered in the case at bar. The compensation awarded by the Court in this action must, therefore, be



measured by, and be based solely on, the plan authorized by Congress in the Flood Control Act of May 15, 1928, "the adopted project"—the Jadwin Plan. No other unanticipated, undetermined conditions could, by any human or legal possibility, have been within the contemplation of the parties at the time of the taking, *when compensation was due* and should have been paid.

"When a particular manner of construction has been stipulated for, or agreed upon, the damages should be assessed on the basis of such construction." *Lewis on Eminent Domain*, (3d Ed.) Sec. 712, at p. 1248; and footnote 78.

"The condemnor may bind itself to a specified plan of construction or specified use of the property; and have the damages assessed upon that basis." *Lewis on Eminent Domain*, (3d Ed.) Sec. 830.

The plans and specifications of a petitioner in a condemnation proceeding are binding on such petitioner. Without these it would be impossible to tell the character of the work to be done or the extent of the damage it would do.

*East Peoria Sanit. Dist. v. Toledo P. & W. Rd. Co.*, 37 Ill. 296, at p. 306, 187 N. E. 512, 89 A. L. R. 870.

*Annotation*, 89 A. L. R. 879-887.

*Jacksonville & S. R. Co. v. Kidder*, 21 Ill. 131.

*Cleveland etc. R. Co. v. Hadley*, 179 Ind. 429, 101 N. E. 473, 476, 45 L. R. A. (N. S.) 796.

2 *Lewis on Eminent Domain*, (3d Ed.) Secs. 713, 818, 825, 830, 845, and 846.

4. *Interest.* Of course, such award as the Court will make will include in the final judgment in this case interest from January 10, 1929, or the date of the taking.

*Seattle Mattress & Upholstery Co. v. Seattle*, 134 Wash. 476, 478, 236 Pac. 84.

*Schuylkill Nav. Company v. Thoburn*, 7 Serg. & R. (Pa.) 411.

"Just compensation includes *all elements of value that inhere in the property*, but it does not exceed the market value fairly determined." *Olson v. United States*, 292 U. S. 246, 255, 54 S. Ct. 704, 78 L. ed. 1236.

"When land is not constantly, but only at intervals, overflowed, the fee may be permitted to remain in the owner, subject to *an easement in the United States* to overflow it with water as often as may be necessary from the operation of the improvement." *United States v. Cress*, 243 U. S. 316, 329, 37 S. Ct. 380, 61 L. ed. 746.

*An easement* is defined to be "a right which one person has to use the land of another for a specific purpose." 9 R. C. L., pp. 735-736, Secs. 2-3.

"*An easement is property*, and is within the protection of the constitutional prohibition now under consideration. \* \* \* The right acquired by the defendants is subtracted from the plaintiff's ownership of the land. Whatever interest the defendants have acquired in this respect the plaintiff has lost. If what they have gained is property, then what he has lost is property. If the easement, *when once acquired*, cannot be taken from the defendants without compensation, can the defendants take it from the plaintiff in the first instance without compensation?" *Eaton v. Boston C. & M. Rd. Company*, 51 N. H. 504, 515, 12 Am. Rep. 147.

## 2. What is "Market Value"?

"Since then, the *market value* is the criterion of damages, we are led to inquire what is the market value? The word "market" conveys the idea of selling, and the market value, it would seem to follow, is *the selling value*. It is the price which an article will bring when offered for sale in the market. It is *the highest price* which those having the ability and the occasion to buy are willing to pay. The owner in parting with his property to the State is entitled to receive just such an amount as he could obtain if he were to go upon the market and offer the property for sale. To give him more than this would be to give him more than the market value and to give him less would not be full compensation. Of course, real estate is not like cotton, grain and other commercial products. It cannot be sold upon an hour's notice. To sell land at its market value *sometimes requires effort and negotiation for some weeks or even some months*. And when we say that the owner is entitled to receive the price for which he could sell the property, *we do not mean the price he would realize at a forced sale on short notice*, but the price that he could obtain *after reasonable and ample time* such as would ordinarily be taken by an owner to make sale of like property." *ORGEL on VALUATION under EMINENT DOMAIN*, p. 63, Sec. 19.

*Little Rock Junction Ry. v. Woodruff*, 49 Ark. 381, 390, 5 S. W. 792.

"'Fair market value' is a term of law, not of economics." *ORGEL etc.*, p. 260, Sec. 80.

"Much as the courts like to declare the 'market value of the property taken' as the measure of compensation, *they do not hesitate to depart from this measure, either in fact or in effect, when the condemned property rights*

"Just compensation to be awarded for the appropriation of lands by the United States *should not be confined to the value of the lands at the time of the taking*, but should include such addition thereto as may be required to produce the *present full equivalent of that value paid contemporaneously with the taking*, as by the addition of interest at a reasonable rate."

*United States v. Creek Nation*, 295 U. S. 103, 55 S. Ct. 681, 79 L. ed. 1331, 1332.

"This minimum (requirement of 'just compensation') includes the allowance of interest on the amount of the award *from the date of the taking to the date of the award of compensation*," *ORGEL etc.*, Sec. 5, p. 18; and footnote 20.

*Jacobs v. United States*, 290 U. S. 13, 17, 54 S. Ct. 26, 78 L. ed. 142, 96 A. L. R. 1.

*Seaboard Airline Ry. Co. v. United States*, 261 U. S. 299, 306, 43 S. Ct. 354, 67 L. ed. 664.

*Phelps v. United States*, 274 U. S. 341, 47 S. Ct. 611, 71 L. ed. 1083.

*Brooks-Scanlon Corporation v. United States*, 265 U. S. 106, 44 S. Ct. 471, 68 L. ed. 934.

5. *Costs.* The appellant is also entitled to judgment for all her costs incurred in this action.

"Costs are allowed against the United States in a suit brought under the Judicial Code, Sec. 24 (20)"—the Tucker Act. *United States v. Cress*, 243 U. S. 316, 37 S. Ct. 380, 61 L. ed. 746, 754-755.

**MEASURE OF DAMAGES:** Difference in Market Value.

1. While it is not strictly accurate to speak of "*damages*" in connection with a suit for recovery under the

provisions of the Fifth Amendment, because strictly speaking and technically the United States is not liable for "damages," nevertheless the decisions habitually refer loosely to the yardstick for the admeasurement of the constitutional "just compensation" as being the "*measure of damages*" which respondent is entitled to recover. This measure of damages is the difference between the market value of respondent's property before and after the taking by the Government; or the difference between the value of respondent's land free from, and subject to, the rights taken.

"When the defendant has already entered upon the property, and has depreciated its value thereby, *the measure of damages is the difference between the fair market value of the whole property at the time of the condemnation and the present market value of the property left with the structure thereon.*" 10 R. C. L., p. 129, Sec. 112.

When the fee which is left in the owner "has a real and substantial value, the condemning party is not bound to pay the full value of the land taken, but merely *the decrease in market value* that is due to the imposition of the public easement; in other words in awarding compensation the value of the interest in the land remaining to the owner is to be deducted from the (total) fair market value of the land." 10 R. C. L., p. 134, Sec. 117.

"The plaintiff's damage for the taking is the difference between the value of the land free from, and subject to, the rights taken." *Emmons v. Utilities Power Company*, 83 N. H. 181, 141 Atl. 65, 67, 58 A. L. R. 788.

*Alabama Power Company v. Carden*, 189 Ala. 384, 66 So. 596.



sary to reinstate him in his business or in a new home." *ORGEL on VALUATION under EMINENT DOMAIN*, p. 822.

The instant case effectively illustrates the truth of the foregoing statement by Mr. Orgel of hardships incident to the arbitrary exercise of the sovereign power of eminent domain. Regardless of the amount of the award made by the Court in this case, it is doubtful that this respondent will be sufficiently reimbursed even for the actual, unusual cost to her of this particular litigation, to say nothing of her actual loss and the delay and uncertainty of the date of payment.

*"The law of eminent domain deals with the most drastic interferences of government with private property; interferences so severe that they are closely hemmed in by strict constitutional safeguards as to compensation. The problem of compensation is not merely an ethical one; it is also psychological and economic."* *ORGEL etc.*, p. 836, Sec. 242.

*"The paramount law intends that the owner shall be put in as good condition pecuniarily by a just compensation as he would have been if the property had not been taken. . . . No private property may be appropriated to public use unless a full and exact equivalent for it be returned to the owner."*

*Olson v. United States*, 292 U. S. 246, 254, 255, 54 S. Ct. 704, 78 L. ed. 1236.

*United States v. New River Collieries Co.*, 262 U. S. 341, 43 S. Ct. 565, 67 L. ed. 1014.

*A judicial question.* The determination of what constitutes this just compensation is purely a judicial question.

*"The ascertainment of compensation is a judicial function and no power exists in any other department of the government to declare what the compensation shall be or to prescribe any binding rule in that regard."*

*United States v. New River Collieries Co.*, 262 U. S. 341, 343, 43 S. Ct. 565, 67 L. ed. 1014.

*Monongahela Navigation Company v. United States*, 148 U. S. 312, 327, 13 S. Ct. 622, 37 L. ed. 463, 468.

*"As was said by the Supreme Court of Nevada: 'No Legislature can diminish by one jot the rotund expression of the Constitution' requiring just compensation. Virginia & T. R. Co. v. Henry*, 8 Nev. 165. *'Just compensation is a fair and full equivalent for the loss sustained by the taking for public use.'*"

*Cribbs v. Benedict*, 64 Ark. 555, at p. 559, 44 S. W. 707.

## 2. When "Just Compensation" is due.

In the instant case the petitioner United States should have paid the respondent the just compensation to which she is entitled immediately after the dedication of her property as a floodway became definitely fixed as a matter of law, viz., on January 10, 1929, or certainly within a reasonably short time thereafter.

*"While the owner is not to be dis-seized until compensation is provided, neither, on the other hand, when the public authorities have taken such steps as finally to settle upon the appropriation ought he to be left in a state of uncertainty, and compelled to wait for compensation until some future time, when they may see fit to use his land. The land should be either his or he should be paid for it. Whenever, therefore, the necessary steps have been taken on the part of the public to select the property*

lar limitation on the power of all the States." *ORGE* on *VALUATION* under *EMINENT DOMAIN*, p. 4, Sec. 1.

"This requirement (just compensation) determines the *minimum basis of compensation* throughout the entire United States." *ORGE* on *VALUATION* under *EMINENT DOMAIN*, p. 18.

"The right of property is before and higher than any constitutional sanction; and private property shall not be taken, appropriated or damaged for public use, without just compensation therefor."

*Constitution of the State of Arkansas* of 1874, Art. II, Sec. 22.

*Little Rock & Fort Smith Ry. Co. v. Greer*, 77 Ark. 387, 392; 96 S. W. 129.

"Just compensation is a fair and full equivalent for the loss sustained by the taking for public use." *Cribbs v. Benedict*, 64 Ark. 555, 559; 44 S. W. 707.

"It is a principle of natural justice, as well as constitutional law, that no one can be lawfully deprived of his property without his consent, or having compensation allowed him by due course of law."

*Brown v. Morison*, 5 Ark. 217.

*Roberts v. Williams*, 15 Ark. 43.

*Memphis etc. Ry. Co. v. Organ*, 67 Ark. 84, 89, 55 S. W. 952.

*Cairo etc. Ry. Co. v. Turner*, 31 Ark. 494, 500.

*Ex parte Martin*, 13 Ark. 198, 206-207, 209.

*Louisiana etc. Ry. Co. v. State*, 85 Ark. 12, 106 S. W. 960.

*State v. St. Louis, etc., Ry. Company*, 85 Ark. 422, 424, 108 S. W. 508.

# 1. What is "Just Compensation"?

"'Just compensation,' say the courts of this country including the highest court, is a *compensation sufficient to make good the loss of the owner*. In the words of Mr. Justice Butler, the owner is 'entitled to the full money equivalent of the property taken, and thereby to be put in as good a position pecuniarily as it would have occupied, if its property had not been taken.'"

ORGE on VALUATION under EMINENT DOMAIN, p. 146.

*United States v. New River Collieries Company*, 262 U. S. 341, 43 S. Ct. 565, 67 L. ed. 1014.

*United States v. Chicago, Burlington & Quincy Rd. Co.*, 82 Fed. (2d) 131, 106 A. L. R. 942; cert. denied 298 U. S. 689, 56 S. Ct. 957, 80 L. ed. 1408.

"Still another reason for the apparent excess of condemnation awards over the strict market value is that the sympathy of the court is likely to be on the side of the dispossessed property owner. And this sympathy is usually warranted and justified by the facts. Not only is the owner deprived of his property by compulsory process, but defects in condemnation procedure often impose very severe hardships upon him. Under the system of condemnation by administrative order, title to the condemned property vests in the condemnor at the outset of the proceeding. Here the principal hardship is the delay in the determination of compensation and in the postponement of payment. Although the owner is entitled to interest for the delay, this is often insufficient to repay him for his loss, for the uncertainty of the date of payment and of the amount of compensation makes it difficult, and in some cases impossible, for him to secure the financing neces-

(15) "I have never lived in the State of Arkansas and have no personal familiarity with any of the conditions in Desha County or Chicot County. I know nothing about the conditions, or difference in fertility, of either of the tracts of land referred to, nor have I any idea of the conditions which led up to the transactions about which I have testified. Only ten of the transactions to which I have testified are in Desha County, and I do not know how many of them represent sales made by The Federal Land Bank in comparatively recent years for the purchase price of which they merely took mortgages back" (Bayley, R. 234-235).

(16) "I am an employee of the Vicksburg United States Army Engineering District, and have prepared graphs showing the trend of cotton production in the floodway area in Desha and Chicot Counties. The cotton production figures I have given cover all of each of the counties named, and are not limited to the area within the proposed Boeuf Floodway. My figures are based on ginning reports for the entire county, regardless of where the cotton came from" (McWhorter, R. 235-237, 399, 401).

These are ALL of the witnesses offered in the trial court by petitioner on the issue of values, as affecting respondent's *actual loss*. We seriously and respectfully submit that the offering of such inane testimony, condemned to incompetency on the face of it, verges on manifest contempt for Justice and of the Court to which it is offered. Such amphogoric fiddle-faddle is significant only in loudly proclaiming that, notwithstanding its inexhaustible resources, the petitioner was unable to defend against the



truth of respondent's charge with any competent or credible testimony.

The trial court erred in refusing respondent's requested Conclusions of Law Nos. 48 and 49 (R. 346).

### 3. **AUTHORITIES** on compensation.

The Fifth Amendment to the Constitution of the United States provides:

"Nor shall private *property* be *taken* for public use, without *just compensation*."

We have discussed at length, and somewhat exhaustively as well as authoritatively, the meaning of the words "*property*" and "*taken*." See Point V, B, 4. These conclusive authorities impel the inescapable conclusion that respondent's *property* has been *taken*. Every requirement of the established legal principles involved, and of fair reasoning, has been met and discharged by the indubitable record facts.

Therefore, we now reach the practical consideration of what is meant by the words "**JUST COMPENSATION**" as found in the Fifth Amendment. What shall be the yardstick by which the Court shall determine the actual award to be made the respondent in this case?

"It is the law of the land, in the United States, that property shall not be taken for a public purpose without the payment of 'just compensation.' The Fifth Amendment to the Federal Constitution expressly imposes this limitation on the power of Congress, and the Fourteenth Amendment, while devoid of this specific language, has been interpreted by the Supreme Court to impose a simi-

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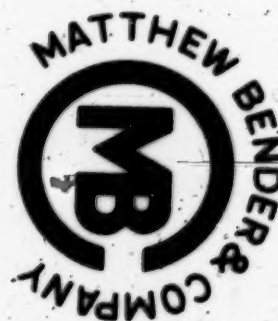
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Recovery in condemnation is limited to damages, present or prospective, arising from *risks or hazards* known or reasonably to be expected to result from construction and maintenance of the improvement in a proper and legal manner.

*Missouri R. & L. Co. v. Creed*, 325 Mo. 1194, 32 S. W. (2d) 783, from 30 S. W. (2d) 605.

"Past as well as *probable future injury* to the lands flowed, should be assessed in *proceedings to condemn the right of flowage*."

*Doty v. Johnson*, 84 Vt. 15, 23, 77 Atl. 866.

"*Absolute certainty as to the damages sustained need not be shown*, but all that the law requires is that such damages be allowed as in the judgment of fair men directly and naturally result from the injury for which suit is brought."

*Hetzel v. Baltimore, etc., R. Company*, 169 U. S. 26, 18 S. Ct. 255, 42 L. ed. 648.

"The determination is to be made in the light of all facts affecting the market value that are shown by the evidence taken in connection with those of such general notoriety as not to require proof."

*Olson v. United States*, 292 U. S. 246, 257, 54 S. Ct. 704, 78 L. ed. 1236, at p. 1245.

"Flooding the property was not a taking where the property was already acquired for and dedicated to that purpose."

*Mullen Benevolent Corp. v. United States*, 63 Fed. (2d) 48, 56.

### 7. Fears and Apprehended Hazards.

Various counsel for petitioner have seen fit, from time to time, to argue, somewhat sarcastically, that respondent has as yet suffered *no real damage*, but that she seeks to recover for some sort of psychological loss based on ghostly fears and intangible hazards. Counsel apparently have no proper conception of the implications and import of the term "market value," so clearly established by the authorities hereinbefore cited. On proper occasion when to the benefit of their client, doubtless these same counsel would be quick to correctly plead and prove the legal fact that in the ultimate analysis *values are almost entirely mental*. When Columbus discovered America, the lands of the alluvial valley of the Mississippi River, including respondent's property, were just as fertile and desirable as they are today, but there was in this rich valley neither *property* nor *value*. No person was present who *desired a property right* in the land sufficient to pay \$100 per acre therefor, as did respondent on January 20, 1927. That the market value of respondent's property was practically destroyed cannot be doubted. That such destruction of value resulted from "fears and apprehended hazards" is not at all material, as is undeniably declared by the Supreme Court of the United States in the case of *Portsmouth Harbor Land & Hotel Company v. United States*, 260 U. S. 327, 43 S. Ct. 135, 67 L. ed. 287. Substituting only the word "floods" for "guns," the language of the Supreme Court precisely describes respondent's position as follows:

"There is no doubt that a serious loss has been inflicted upon the claimant, as *the public has been frightened off the premises by the imminence of the guns (floods).*"

*Portsmouth Harbor Land & Hotel Co. v. United States, supra.*

"No contract shall be entered into for the erection, repair or furnishing of any public building or for any public improvement which shall bind the Government to pay a larger sum of money than the amount in the Treasury appropriated for the specific purpose." *Revised Statutes*, Sec. 3733; Title 41 U. S. C. A., Sec. 12.

Therefore, there is no way in which the Government could be compelled to close the crevasses. Not being compulsory, the repair of the fuse-plug levee would be a gratuitous thing not to be assumed by the Court in adjudicating the compensation to be awarded in this case.

"Privileges which are merely permissive and subject to the paramount right of revocation by the condemning party cannot be available of in reduction of damages."

*Old Colony R. Co. v. Miller*, 125 Mass. 1, 28 Am. Rep. 194.

*In Re: Board of Water Supply*, 109 N. Y. State 1036.

On the contrary, it is well established by all of the decisions in point that the respondent is entitled to have her damages assessed on the assumption of the most adverse flood conditions reasonably possible, the most extreme meteorological conditions including rainfall, wind and heat, the most extreme flood frequencies, the most extreme flood volumes and successive rises, and the most extreme flood durations which might reasonably be expected to occur from time to time in the future, remembering from past history that these conditions have been for many years consistently increasing in their disastrous results. Because if and when these possible things do occur there is no possible further relief for respondent. She has had her day in court. Her exclusive recompense for



such catastrophic calamities is *NOW*. The Court will constantly bear in mind that if, as and when the greatest possible disaster does overtake the respondent from the use of the Boeuf Floodway, even under the most unforeseen and unanticipated circumstances, still, having had her day in court, and the Government having acquired the flowage right, and having been "*PAID ONCE FOR ALL*," the respondent can never claim any further relief from the Government. *Mullen Benevolent Corp. v. United States*, 63 Fed. (2d) 48, 56. Small wonder, then, her property now has only nominal market value.

"The rule in condemnation proceedings is that *all damages, present or prospective*, that are the natural or reasonable incident of the improvement to be made, or work to be constructed, \* \* \* must be assessed, and *there can be but one assessment of such damages*." 20 *Corpus Juris*, p. 997, Sec. 394; and cases cited.

"In condemnation proceedings a landowner is entitled to recover for *all damages, present and prospective*, which may be known or may reasonably be expected to result from the construction and maintenance of the improvement in a proper and legal manner, since *there cannot be successive proceedings*." 20 *Corpus Juris*, 763, Sec. 225; and numerous cases cited.

"*All damages, past, present and future*, which naturally or necessarily or proximately arise from the taking, *whether they were in contemplation of the parties at the time or not*, \* \* \* are conclusively presumed to have been included in the compensation award in the condemnation."

*Lockhart Power Co. v. Askew*, 110 S. C. 449, 455, 96 S. E. 685.

The public no longer desires respondent's property in the *Government's floodway*. Therefore, the public will not buy. Hence, there is no market value.

All of the courts hold that *anything* which affects the mind of the average buyer of real property is competent evidence in determining the market value of land. See cases hereinafter cited, and innumerable decisions *passim*.

Counsel ignore the legal and actual fact that, when all is said and done, *market values of all kinds are purely mental*.

### "Values are Mental."

The reason upon which the decisions of all the courts are based is very clearly developed in a recent book by eminent scientists as follows:

"Another problem of psychological interest is that the values of the products of business, namely, commodities and services, are largely *mental* . . .

"*Human behavior in business*. Trade by which work, services, or goods are exchanged for other work, services, or goods, is business. And nearly all of our daily concerns revolve around it. And this *business goes on in men's minds*, not in offices, shops, or warehouses. Business is human behavior. It revolves around values and *values are mental*. Prices are merely measures of value in terms of money established when two minds meet as buyer and seller.

"A young Wisconsin farmer decided, in 1920, to add 40 adjacent acres to his farm. He paid \$5,000 for the land, securing \$2,800 of this amount from a first mortgage on his new property. In 1933 he still owed \$2,200 on the mortgage. He tried to sell the land but he could not get

enough to cover the mortgage, in fact he was unable to get an offer at all.

"This piece of land was intrinsically just as good in 1933 as in 1920. It was still 40 acres. It was just as fertile. It raised just as big crops and just as good ones. It was surrounded by the same neighbors. Nothing had changed in its physical or human environment. The tract was located exactly the same distance from its near-by trading city. This city was very nearly the same size as it was in 1920—about 38,000. The demands and needs of the city's population were just as they were in 1920.

"But this had happened. In 1920 every farmer wanted to buy land or add to his farm; in 1933 no one wanted to buy land. In 1920 there were more buyers than sellers; in 1933 there were far more sellers than buyers.

*"Values are mental.* The old basic law of supply and demand is partly physical, partly mental. The supply side is largely physical; the demand side is largely mental. *In determining values the mental demand side usually plays by far the larger part.* There may be a very small supply of a certain commodity, but if no one wants it, it has no value. If many people want it, it may have a fabulous price. \* \* \*

*"Not only are values mental. What is more, they are largely emotional.* You want a thing because you want it. You may think of reasons for it to justify your desires to your friends or to yourself. The desire moves you to buy.

"The New York Stock Exchange is perhaps the most sensitive large barometer of values in the United States. Sellers and buyers in large numbers are constantly face to face every moment of the business day. It is a constant balance or change of balance between the number of sellers and buyers. If the number of sellers increases and the

*Olson v. United States*, 292 U. S. 246, 54 S. Ct. 704, 78 L. ed. 1236, at pp. 1244-1245.

*Clark's Ferry Bridge Co. v. Public Service Commission*, 291 U. S. 227, 54 S. Ct. 427, 78 L. ed. 767.

2 *Lewis, Eminent Domain*, (3d Ed.) Sec. 707, p. 1233.

1 *Nichols, Eminent Domain*, (2d Ed.) Sec. 220, p. 671.

*New York v. Sage*, 239 U. S. 57, 61, 36 S. Ct. 25, 60 L. ed. 143, 146.

*National City Bank v. United States*, 275 Fed. 855, 860.

"The award is to be made for the fair market value for all available uses and purposes. The owner of lands is entitled to their fair market value for the most profitable use for which the property is available."

*Matter of City of New York*, 230 App. Div. 41, 243 N. Y. S. 63.

*Mississippi & R. R. Boom Co. v. Patterson*, 98 U. S. 403, 25 L. ed. 206, 208.

*Wetmore v. Rymer*, 169 U. S. 115, 18 S. Ct. 293, 42 L. ed. 682, at p. 686.

*Conneas v. Commonwealth*, 184 Mass. 541, 69 N. E. 34.

*Southern Ry. Co. v. Memphis*, 126 Tenn. 267, 148 S. W. 662, 41 L. R. A. (N. S.) 828.

*Muscoda Bridge Co. v. Grant County*, 200 Wis. 185, 227 N. W. 863.

*Raleigh v. Mecklingburg Mfg. Co.*, 169 N. C. 219, 85 S. E. 300, L. R. A. 1916a, 1090.

*Central Georgia Power Co. v. Mays*, 137 Ga. 120, 72 S. E. 900.

*In re New York etc. Co. v. Blacker*, 178 Mass. 386, 59 N. E. 1020.

*McCandless v. United States*, 298 U. S. 342, 56 S. Ct. 764, 80 L. ed. 1205.

6. Compensation once for all time and most possible damages.

Instead of following the curious, ingenious, vague and highly speculative suggestions of witnesses offered by the

petitioner that, years after the original taking, they are now hoping that respondent's original loss may be to some extent mitigated or modified, the actual rule of law is directly to the contrary.

"As the damages must be assessed once for all, \* \* \* the rule is that the damages are to be assessed on the basis of the most injurious mode of construction that is reasonably possible."

*Cleveland, etc., R. Co. v. Hadley*, 179 Ind. 429, 101 N. E. 473, 45 L. R. A. (N. S.) 796.

*Jacksonville & S. R. Co. v. Kidder*, 21 Ill. 131.

*Idaho & W. R. Co. v. Columbia Conference*, 20 Idaho 568, 119 Pac. 60, 38 L. R. A. (N. S.) 497.

1 *Lewis, Eminent Domain*, (3d Ed.) Sec. 389, p. 710, *et seq.*; and numerous cases cited.

The foregoing authorities emphasize the fact that the Court should not assume that crevasses in the fuse-plug levee hereafter occurring will be repaired; nor that proper authority for appropriations therefor will later be enacted into law; nor that proper authority and appropriations for future dredging made necessary by the experimental cut-offs will be made; nor any other such possible beneficial action may occur which the United States may, or may not, see fit to grant.

"No act of Congress shall be construed to make an appropriation out of the Treasury of the United States or to authorize the execution of a contract involving the payment of money in excess of appropriations made by law, unless such Act shall in specific terms declare an appropriation to be made or that a contract may be executed." *Act of June 30, 1906*, 34 Stat. 764, Title 31 U. S. C. A., Sec. 627.



ued for purposes of fixing the compensation. The ordinary phrase is 'value *at the time of the taking*,' although the 'time of taking' may itself be fixed, sometimes by one event, sometimes by another." *ORGEL etc.*, p. 68, Sec. 20, and authorities cited in footnotes.

"While the language of the law or its construction is that *its value must be fixed as at the time of its appropriation or taking* of the property, still it is not right that you should subject these parties to the consequences of what we all suppose to be a temporary depression and stringency of the money market. If this were permitted it might have a great effect upon the value of this property. Therefore you will not take into consideration the state of affairs existing today, but \* \* \* relieving it from the pressure which may now be upon it. This rule applies more particularly to real estate."

*ORGEL etc.*, p. 79, Sec. 23 and p. 85, Sec. 25.

*United States v. Inlots*, 26 Fed. Cas. 490, 494, aff'd in *Kohl v. United States*, 91 U. S. 367, 23 L. ed. 449.

*National City Bank v. United States*, 275 Fed. 855, aff'd 281 Fed. 754.

*United States v. New River Collieries Co.*, 276 Fed. 690, aff'd 262 U. S. 341, 43 S. Ct. 565, 67 L. ed. 1014.

*C. G. Blake Company v. United States*, 275 Fed. 861, 864, aff'd 279 Fed. 71.

"*'Market value at the time of the taking*,' explicitly or implicitly identified with 'fair market value,' and accepted by all American courts in most cases, and by some American courts in all cases, is the proper measure of compensation when property is taken by power of eminent domain." *ORGEL etc.*, p. 112, Sec. 35.

*Tilden v. United States*, (D. C. La., 1934) 10 F. Supp. 377, 379.

"The value of property condemned, by which compensation to its owner is measured, does not include any element resulting subsequently to or because of the taking."

*Olson v. United States*, 292 U. S. 246, 54 S. Ct. 704, 78 L. ed. 1236, 1237, at p. 1245; and cases there cited.

A statute, like the Flood Control Act of May 15, 1928, must be construed by the Court and enforced in the light of conditions then existing and of circumstances leading to its passage. *United States v. Creek Nation*, 295 U. S. 103, 55 S. Ct. 681, 79 L. ed. 1331.

Therefore, we most earnestly and confidently submit, this Court will not concern itself with the mass of highly speculative, vague and uncertain testimony introduced into this case by the petitioner relative to the experimental cut-off program initiated by the Government a number of years after the alleged taking of respondent's property, nor with testimony relative to what *might possibly* happen under the provisions of the Overton Bill (Act of June 15, 1936) passed two years after the plaintiff filed her present action. When this incompetent evidence has been eliminated, the Court will discover that the petitioner is left without defense.

#### 4. Value to the Owner.

"When property is taken, its value to the owner is the only strictly relevant value, and that market value is acceptable only to the extent that it may be taken as a rough, practical measure of value to the owner." ORGEL on

*VALUATION under EMINENT DOMAIN*, Chapter III; and p. 146, Sec. 45.

"The value of the property to the Government for its particular use is not a criterion. *The owner must be compensated for what is taken from him*; but that is done when he is paid *its fair market value for all available uses and purposes.*"

"And Mr. Justice Holmes said in another case: 'The question is, What has the owner lost? not, What has the taker gained?'"

"In denying that value to the taker is the measure of compensation when property is taken for a public use, these statements express *the uniform law of the land.*"

*ORGEL etc.*, p. 257, Sec. 79; and p. 258, footnote 3.

*United States v. Chandler-Dunbar Co.*, 229 U. S. 53, 81, 33 S. Ct. 667, 57 L. ed. 1063.

*Boston Chamber of Commerce v. Boston*, 217 U. S. 189, 30 S. Ct. 459, 54 L. ed. 725.

1 *NICHOLS, EMINENT DOMAIN*, 663.

2 *LEWIS, EMINENT DOMAIN*, Sec. 706.

*Omnia Commercial Company v. United States*, 261 U. S. 502, 43 S. Ct. 437, 67 L. ed. 773.

"The value to the taker is clearly *irrelevant* as a measure of *the owner's loss*, and the courts refer to it only to exclude it from consideration." *ORGEL etc.*, Sec. 236, at p. 810, and at p. 815.

##### 5. Most Valuable and Profitable Use.

"*The courts are unanimous in admitting testimony on the adaptability of property for this use and for that, save for the familiar restrictions against the consideration of highly 'remote and speculative' contingencies.*"

"The owner of lands is entitled to their fair market value for the most profitable use for which the property is available."

ORGE on VALUATION under EMINENT DOMAIN, Sec. 30, at p. 99; and Sec. 236, at p. 815.

*Matter of City of New York (Inwood Hill Park)*, 230 App. Div. 41, 243 N. Y. S. 63.

The owner must be compensated for what is taken from him; but that is done when he is paid for its fair market value of all available uses and purposes." ORGE etc., Sec. 45, p. 146, footnote 58.

*United States v. Chandler-Dunbar Co.*, 229 U. S. 53, 81, 33 S. Ct. 667, 57 L. ed. 1063.

"Just compensation includes all elements of value that inhere in the property, but it does not exceed market value fairly determined. The sum required to be paid the owner does not depend upon the uses to which he has devoted his land but is to be arrived at upon just consideration of all the uses for which it is suitable. The highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future is to be considered, not necessarily as the measure of value, but to the full extent that the prospect of demand for such use affects the market value while the property is privately held. . . . The fact that the most profitable use of a parcel can be made only in combination with other lands does not necessarily exclude that use from consideration if the possibility of combination is reasonably sufficient to affect the market value. Nor does the fact that it may be or is being acquired by eminent domain negative consideration of availability for use in the public service."

It has hereinbefore been clearly established by numerous unimpeachable authorities that the "*Owner at the Time of Taking*" of the property, and that owner alone is, entitled to recover. Immediately upon "the taking," the right to just compensation becomes a *personal claim* vested in the then owner, which claim does not pass to any subsequent purchaser by conveyance of the land, which is subject to the easement taken. See Lewis, *Eminent Domain*, (3d ed.) p. 936; and cases there cited. In this case respondent has the *sole* legal privilege of enforcing this her *personal* right to compensation which abides in her alone. No other person is a proper party plaintiff or claimant in her action.

Owners of distinct interests in a tract of land, as for instance the respective owners of (a) *the fee*, (b) *an easement*, (c) *a mortgage*, or (d) *other lien* have *separate rights of action*; and may not be forced (or even permitted) to pool their interests and have the damages assessed in a lump sum, and awarded as if the land was the sole property of one owner.

"It (the Fifth Amendment) merely requires that an owner of property taken should be paid *for what is taken from him*.

*"It deals with persons, not with tracts of land.*

"And the question is, What has the owner lost? not, What has the taker gained? We regard it as entirely plain that *the petitioners were not entitled, as a matter of law, to have the damages extended as if the land was the sole property of one owner; . . .*"

*Boston Chamber of Commerce v. City of Boston*, 217 U. S. 189, 30 S. Ct. 459, 54 L. ed. 725, 727.

"Persons holding several distinct interests in the same parcel of land may either maintain an action jointly, or pro-



*ceed separately.*" 20 *Corpus Juris*, 1187; and numerous cases cited in footnotes.

"Two or more persons having distinct causes of action, although against the same defendant, may not join as plaintiffs in one suit, and it is immaterial that the causes of action arise out of the same transaction, or that they are kindred and depend upon similar facts." 47 *Corpus Juris*, p. 56, Sec. 115; and cases cited in footnotes.

"The cause of action is the subject-matter of the controversy, and that is, for all the purposes of the suit, whatever the plaintiff declares it to be in his pleadings."

*Chicago B. & Q. Ry. Co. v. Willard*, 220 U. S. 413, 31 S. Ct. 460, 55 L. ed. 521, at p. 526; and numerous other Supreme Court decisions there cited.

"\* \* \* a plaintiff has the right to prosecute his suit to final decision in his own way.

"\* \* \* the plaintiff may select his own manner of bringing his action.

"\* \* \* the plaintiff may elect his own method of attack, and the case which he makes in his declaration, bill of complaint, \* \* \* is to determine the \* \* \* character of the controversy \* \* \*."

*Chicago B. & Q. Ry. Co. v. Willard*, 220 U. S. 413, 31 S. Ct. 460, 55 L. ed. 521, 526.

Illustrations of recoveries allowed to plaintiffs on less than the entire, unencumbered, fee simple title to the land involved are found in such cases as:

*A. W. Duckett & Company v. United States*, 266 U. S. 149, 45 S. Ct. 38, 69 L. ed. 216, 217, (a leasehold in a dock).

*United States v. Welch*, 217 U. S. 333, 30 S. Ct. 527, 54 L. ed. 787, 789, (an easement of private right-of-way).

*Brainerd v. State*, 131 N. Y. S. 221, 225.

*Fitzhugh v. Chesapeake, etc., R. Co.*, 107 Va. 158, 59 S. E. 415, 17 L. R. A. (N. S.) 124.

*Stertz v. Stewart*, 74 Wis. 160, 162, 42 N. W. 214.

*Milwaukee, etc., R. Co. v. Eble*, 3 Pin. (Wis.) 334, 362.

"The commissioners are authorized to take into account the depreciated value or salable value of the land caused by the risk to be apprehended from fires (or floods) that may never occur."

*St. Louis, etc., R. Co. v. Mendoza*, 193 Mo. 518, 525, 91 S. W. 65, 66.

*Evans v. Iowa Southern Utilities Co.*, 205 Ia. 283, 218 N. W. 66.

*Louisville & N. R. Company v. Lambert*, 33 Ky. L. R. 199, 110 S. W. 305.

"In determining the value of land appropriated for public purposes the same considerations are to be regarded as in a sale of property between private parties."

*Mississippi & R. R. Boom Co. v. Patterson*, 98 U. S. 403, 25 L. ed. 206.

"The courts have generally accepted the estimates of qualified witnesses in proof of the market value of condemned land. . . . A witness may testify to the value before and after the taking or damage." *ORGEL, etc.*, Sec. 129, pp. 437-438; and Sec. 130, p. 439.

*Montana Ry. Company v. Warren*, 137 U. S. 348, 353, 11 S. Ct. 96, 34 L. ed. 681.

2 *Lewis, Eminent Domain*, Sec. 655.

4 *Wigmore, Evidence*, Sec. 1942.

*Lawson, Expert and Opinion Evidence*, 491.

"After a witness has testified that he knows the property and its value, he may be called upon to state such value. The means and extent of his information, and

therefore the worth of his opinion, may be developed at length on cross-examination."

*Montana Ry. Company v. Warren*, 137 U. S. 348, 354, 11 S. Ct. 96, 34 L. ed. 681.

*ORGEL, etc.*, Sec. 130, p. 444-445.

"It is not proper to give a witness a list of sales (or mortgages) and ask him to form a judgment based on the hypothesis that the list represents sales (or loans)." See R. 232-234.

*ORGEL, etc.*, Sec. 132, p. 450.

*Chicago, etc., R. Rd. Co. v. Heidenreich*, 254 Ill. 231, 239, 98 N. E. 567, Ann. Cas. 1913c, 266.

"Opinion testimony is a staple type of evidence in proof of value in condemnation cases.

"Expert testimony based upon all the circumstances is the accepted and perhaps the only practical method of proving market value in condemnation cases.

"Value witnesses are not required to be professionally engaged in real estate appraisal, nor are they deemed to possess peculiar powers of inference from stated facts. Their testimony is received if they show an acquaintance with the property and are informed as to the state of the market."

"The readiness with which the court accepts the owner as a witness may perhaps be taken to show that consideration in fact, though not in legal theory, is given to the VALUE TO THE OWNER."

*ORGEL, VALUATION* under *EMINENT DOMAIN*, Sec. 133, pp. 452-453; and cases there cited.

Evidence of other sales "must not be too remote in time" and "there must be no drastic change in market con-

ditions." *ORGEL, VALUATION under EMINENT DOMAIN*, Sec. 137, p. 464; and cases there cited.

"The courts that reject sales to the condemnor, while admitting evidence of other sales on direct examination, base their exclusion on the ground that a sale to a condemning party is in effect a *forced sale*, that at best it represents a *compromise*, and that consequently it furnishes no true indication of the price at which the property could be sold in the open market to a 'willing buyer'." *ORGEL, VALUATION under EMINENT DOMAIN*, Sec. 146, pp. 489, 492; p. 502; and cases there cited.

"The courts have consistently refused to accept official valuations as evidence of market value in condemnation proceedings. . . . The courts universally exclude the *assessor's valuation*." *ORGEL, etc.*, Sec. 153, pp. 517-518; and Sec. 150, p. 509.

*Springfield & Memphis Ry. v. Rhea*, 44 Ark. 258.

*St. Louis, etc., Ry. Co. v. Magness*, 93 Ark. 46, 123 S. W. 786.

Each of the foregoing well-known rules were strictly met by the witnesses heard in the trial court as produced by respondent herein. They were utterly ignored by petitioner and its witnesses.

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## POINT XII.

## PROPER PARTIES.

This action was instituted by Mrs. Julia Caroline Sponenbarger as the *sole plaintiff* (R. 4-16, 93). The District Court erred in granting the motion of petitioner to make additional parties plaintiff (R. 21, 25), for the reasons assigned in the protests of respondent (R. 26), Grady Miller as Receiver (R. 28), and Rowell, *et al.*, as Receivers (R. 30). The District Court erred in refusing respondent's requested Conclusions of Law Nos. 57, 58, 59 and 60 (R. 349-350).

"No past due taxes or assessments of any kind are due to the State of Arkansas, the Southeast Arkansas Levee District, the Cypress Creek Drainage District, or any other taxing authority" (Sponenbarger, R. 181). This fact is not disputed. There is no mortgage on respondent's land.

The respondent, **MRS. JULIA CAROLINE SPONENBARGER**, and the petitioner, the **UNITED STATES**, are the *only* proper parties in this action.

At this point, we pray the Court to consider and adjudge the following pleadings, viz.:

(a) "Assignment of Error Re. Additional Parties" filed by the respondent, Mrs. Julia Caroline Sponenbarger (R. 26); and

(b) "Appearance and Protest of Grady Miller as Receiver for the Southeast Arkansas Levee District" (R. 28); and

(c) "Appearance and Protest of Alex H. Rowell and William R. Humphrey as Receivers of the Cypress Creek Drainage District" (R. 30).



number of buyers decreases, prices go down. If the number of sellers decreases and the number of buyers increases, prices go up. Psychological *values* are constantly changing and in a very sensitive manner. The balance between buyers and sellers is hung on a very fine . . . t."

"CONTROLLING HUMAN BEHAVIOR" by Daniel Starch, Ph. D., Hazel M. Stanton, Ph. D., and Wilhelmine Koerth, Ph. D. "The Macmillan Company—1936," p. 11.

#### 8. Evidence anent Values.

Anything and everything which affects value in the mind of the purchaser is competent. Every consideration which would influence a general buyer is material. These are the things which create market value—the *desire* of the purchaser.

"The owner may show every advantage that his property possesses, present and prospective, in order that it may be satisfactorily determined what price it could be sold for upon the market."

*Kansas City Southern Ry. Co. v. Boles*, 88 Ark. 533, 115 S. W. 375,

*Little Rock Junction Ry. Company v. Woodruff*, 49 Ark. 381, 5 S. W. 792.

*Little Rock & Ft. Smith Ry. v. McGehee*, 41 Ark. 207.

"It is perfectly proper, therefore, for a witness . . . to include in his estimation *any and every feature and consideration which, in his judgment, would influence the general buyer.*"

*Indiana, etc. Co. v. Pennsylvania R. Co.*, 229 Pa. State 484, 487-488, 78 Atl. 1039.

"There is a very wide distinction between giving *damages* for such remote and possible injuries, and *compen-*

sating the owner for the actual depreciation of his property because of its exposure to such hazards and dangers. Whatever may cause the depreciation, the loss to the owner is the same. If, in consequence of its exposure to these remote injuries, the property is diminished one-half in value, then this decrease in value measures the actual loss to the owner."

*Snyder v. The Western-Union Rd. Co.*, 25 Wis. 60, 69.

In *Voight v. Milwaukee*, 158 Wis. 666, 670, 149 N. W. 392, it was claimed that plaintiff's property had been depreciated in market value by the construction of a viaduct and the deflection of trade and travel. The court said:

"Loss of trade by deflection of travel is not in itself a ground of recovery. That is because of the uncertain and speculative character of such damages. Where a deflection of travel with consequent loss of existing prospective patronage has actually diminished the market value of abutting property, so that a buyer would not pay so much for the property as he would in its former advantageous location, the damage becomes more certain, and the injured party recovers, not for his loss of trade, but for the diminution in market value of his property so located in the estimation of the buyers who make the market." *Voigt v. Milwaukee, supra*.

"No element should be excluded in arriving at the market value of premises which is customary for the business world to consider in determining such market value or which an ordinary prudent man would take into account before forming a judgment as to market value of the property which he is about to purchase."

*Wayne County, Ky. v. United States*, 53 Court of Claims 417, aff'd. 252 U. S. 574, 40 S. Ct. 394, 64 L. ed. 723, (an easement of a public road).

*Clark v. United States*, 67 Ct. Cls. 337.

*Chiesa & Co. v. City of Des Moines*, 158 Iowa 343, 198 N. W. 922.

*McGowan v. Milford*, 104 Conn. 452, 133 Atl. 570.

*Watuppa Reservoir Co. v. Fall River*, 134 Mass. 267.

*Storms v. Manhattan Ry. Company*, 79 N. Y. S. 60.

*Hill v. Glendon, etc., Mining Company*, 113 N. C. 259, 18 S. E. 171.

*Reading R. Company v. Boyer*, 13 Pa. St. 496.

*Colcough v. Nashville, etc., R. Company*, 2 Head (Tenn.) 171.

*Grand Rapids Booming Co. v. Jarvis*, 30 Mich. 308.

*Parks v. City of Boston*, 15 Pick. 198.

*Jordan v. City of Benwood*, 42 W. Va. 312, 26 S. E. 266.

*Cayce Land Co. v. Southern Ry. Company*, 111 S. C. 115, 96 S. E. 725.

*Ranforth v. City of New York*, 183 N. Y. S. 629, aff'd. 183 N. Y. S. 956.

*Turner v. R. R. Company*, 130 Mo. App. 535, 109 S. W. 101.

*Peabody v. United States*, 231 U. S. 530, 34 S. Ct. 159, 58 L. ed. 351.

"The fact that the claimant's interest is less than the whole does not affect his right to compensation for land taken or damaged." 20 *Corpus Juris*, p. 653, Sec. 130.

"In an action to recover the value of the land taken it is no defense that a third person has an equitable interest in the property." 20 *Corpus Juris*, p. 1178, Sec. 540; *Whitecotton v. St. Louis etc. R. Co.*, 104 Mo. A. 65, 71, 78 S. W. 318.

"Each (owner of an interest of any kind in realty) is entitled under the Constitution to be compensated in damages for the amount of his interest taken."

*Mayor, etc. of Baltimore v. Latrobe*, 101 Md. 621, 631, 61 Atl. 203, 4 Ann. Cas. 1005.

*United States v. Welch*, 217 U. S. 333, 30 S. Ct. 527, 54 L. ed. 787, 28 L. R. A. (N. S.) 385, 19 Ann. Cas. 680.

\* *ORGEL, VALUATION under EMINENT DOMAIN*, p. 374.

"The general rule is, both under the statutes and in the absence of statutory provision, that, where property is taken or injured under the exercise of the power of eminent domain, *the owner thereof at the time of the taking or injury is the proper person to initiate proceeding or sue therefor.*"

\* 20 *Corpus Juris* 1185, Sec. 545; and numerous decisions there cited.

*Kindred v. Union Pacific Rd. Company*, 225 U. S. 582, 32 S. Ct. 780, 56 L. ed. 1216.

\* *Roberts v. Northern Pacific Rd. Company*, 158 U. S. 1, 15 S. Ct. 756, 39 L. ed. 873.

\* "The right to compensation is a personal claim, and after it has once accrued *does not pass by a deed to the land.*"

2 *Lewis, Eminent Domain* (3d Ed.), p. 936, Sec. 517; and cases there cited.

*Roberts v. Northern Pacific Rd. Company*, 158 U. S. 1, 15 S. Ct. 756, 39 L. ed. 873.

\* 20 *Corpus Juris*, 847, Sec. 286; and numerous cases cited in footnote.

"These rules apply as well to flowage cases as to other forms of taking. If the owner of land flowed conveys, after the flowing and before the easement has been ac-

Sponenbarger, the respondent before this court, and the original defendant, the United States of America, the petitioner herein.

If it be argued that the result of the enforcement of this well established rule of law might expose the United States to numerous suits by the respective claimants, the confusion and difficulty in that respect would be entirely the fault of the United States. Prompt institution of condemnation proceedings by the United States against all parties in interest, as is contemplated and required by Section 4 of the Flood Control Act of May 15, 1928, would have obviated all such objections, resulting only in fair play, just compensation promptly paid, and happiness to all concerned. The Government, as plaintiff, could have controlled its own suit in its own way, naming all the defendants desired. Having failed to discharge its duty under the plain mandate of the Act, it cannot be now heard to complain when respondent seeks her remedy in her own rightful way.

As the court said in *Reading Rd. Company v. Boyer*, 13 Pa. St. 496, 500-501:

"It is of no force to allege that the defendant committing the damage may thereby be put to more expense by several proceedings. Those who inflict injury ought not to be solely regarded. *Those who suffer by the invasion of their private property are entitled to more consideration* in the adjustment of the remedy to their condition and circumstances. \* \* \* We think the objection to the proceeding of the life tenant for the damage done to her interest alone fails. *She was entitled to that remedy.*" 13 Pa. St. 496, at pp. 500-501.



So, in the case at bar, the respondent is entitled to enforce her remedy alone, as it is prayed in her original petition, without the interference, annoyance or confusion of other parties whom she did not involve by her complaint. 20 *Corpus Juris*, 1187-1188, footnote 17; and decisions *passim*.

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### CONCLUSION.

If petitioner has suggested any possible defense which has not been hereinbefore fully discussed, we assure the Court that it has been unintentionally overlooked. After all, the vital issues to be adjudicated on this appeal are quite simple, viz.: (1) has respondent's "property" been "taken"?; and (2) if so, what "just compensation" shall be awarded her, measured by the difference between the market value of *respondent's particular* 40 acres of land *before* and *after* the creation of the Boeuf Floodway by the Flood Control Act of May 15, 1928?

The entire record applicable to each of these two simple questions has been carefully reviewed and frankly discussed. *The case has been fully developed.* Respondent already has suffered inexcusably *long delay* at the hand of petitioner. Her constitutional right to "just compensation *contemporaneously paid* in money" (*Olson v. United States*, 292 U. S. 246, 54 S. Ct. 704, 78 L. ed. 1236), has already been inexcusably and unconscionably ignored far too long. To reach a just conclusion, at long last, in finally answering on this appeal the two simple questions stated, we respectfully submit that this Court will find from the

quired, the right to compensation for the easement passes to the grantee. *But the right to recover such damages as have been sustained up to the time of the conveyance remains with the grantor.*"

2 *Lewis, Eminent Domain* (3d Ed.), p. 937, Sec. 517; and cases there cited.

"Separate suits cannot be maintained for damages by the owner, and persons subsequently acquiring the property, where the injury results from the construction of a permanent structure, but *the owner of the property at the time of the erection of the structure*, is entitled not merely to damages for past injuries, but is entitled, besides, to compensation for injury which his property will reasonably sustain in the future as the result of the permanent injury."

*Louisville & N. R. Company v. Lambert*, 33 Ky. L. R. 199, 110 S. W. 305.

"Granting the compensation here to be, what it certainly is, the price of a *perpetual easement*, it is impossible to imagine a title to it in a subsequent grantee of the land subject to the easement." \* \* \*

"The conclusion established by the decisions is \* \* \* that *the damage belongs to the owner at the time of the taking*, and does not pass to a grantee of the land under a deed made subsequent to that time, unless expressly conveyed therein."

*Roberts v. Northern Pacific Rd. Company*, 158 U. S. 1, 39 L. ed. 873, at pp. 876-877.

20 *Corpus Juris* 847, Sec. 286; and numerous cases there cited.

Where only a part of the mortgaged property is "taken," or where the property is "damaged" but not

"taken," the mortgagee's security is not completely destroyed, and it may not be even substantially impaired if the value of the remaining property gives a sufficient margin over the amount of the debt. In the case of a mere "damaging" it seems that the mortgagee, in order to establish his interest in the condemnation, must show that he did receive material damage.

*Federal Trust Company v. East Hartford Fire Dist.*,  
283 Fed. 95, 99.

*Knoll v. New York etc. R. Company*, 121 Pa. 467, 472,  
15 Atl. 571, 1 L. R. A. 366.

*ORGEL etc.*, Sec. 113, at pp. 382, 383 and 392.

Respondent having paid all taxes and assessments accruing and maturing against her land (R. 181), of course none of the taxing authorities made parties (R. 21-25) could, or attempted to, prove any separate or special loss to them.

It is clear from a careful study of the foregoing authorities that neither of the persons made party on motion of the Government can properly be considered as parties to the suit against their objection and protest. (R. 26-32).

There is no mortgage on any part of respondent's land. All taxes and assessments of every kind and character which had matured against appellant's land to date of trial below had been fully paid and such liens discharged (R. 181). None of the persons made parties by order of the court had any sort of title to any part of respondent's claim against the United States, nor any possible interest in it.

Therefore, we submit, notwithstanding the motion of the Government, the Court will now consider as parties to this action only the original plaintiff, Mrs. Julia Caroline

record that all of the respondent's requests for Findings of Fact and Conclusions of Law should NOW be granted.

As a matter of law, under the evidence submitted, respondent is entitled to judgment against petitioner in the sum of \$4,000, together with interest thereon at the rate of 6% per annum from January 10, 1929, until paid, and for all her costs incurred in this litigation. R. 334 (101) and 350 (61-62).

Respectfully submitted,

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# TO WHOM DOES THE RIVER (MISSISSIPPI) BELONG?

The river belongs to the nation;  
The levee, they say, to the state;  
The government runs navigation,  
The Commonwealth, though, pays the freight.

Now, here is the problem that's heavy,  
Please, which is the right or the wrong?  
When the water runs over the levee,  
To whom does the river belong?

It's the government's river in summer,  
When the state of the river is low;  
But in the spring, when it gets on a hummer  
And starts o'er the levee to flow,

When the river gets suddenly dippy,  
The state must dig down in its till  
And push back the old Mississippi  
Away from the farm and the mill.

I know very little of lawing,  
I've made little study of courts,  
I've done little geeing and hawing  
Through verdicts, opinions, reports.

Why need there be any more said,  
When the river starts levees to climb?  
If the government owns the aforesaid,  
It must own it all the time.

If the bull you are leading should bellow  
And jump over somebody's fence,  
There isn't much doubt you're the fellow  
Expected to bear the expense.

If it follows a Sunday School teacher  
And chases the maid up a tree,  
You're the owner, the same, of the creature,  
Undoubtedly all will agree.

If it's your Mississippi in dry time,  
It's yours, Uncle Sam when it's wet,  
If it's your Mississippi in fly time,  
In flood time it's your river yet.



Government would do to the land within the spillway, would be very much less than the damage of a controlled spillway because it would only be occasionally that the land would be covered in the fuse-plug floodway, and therefore the damage would not amount to anything. In fact, he contended there would be no damage at all. Those who differed with him, differed with him not altogether as to the kind of spillway that should be constructed, but I think, in fact I know, that the representatives of the people who were interested in this land thought there would be damage to the land with the uncontrolled spillway, and that the Government would have to pay the damages. What I mean by the word damages would be what the land was worth if actually used entirely, and also what flowage rights over it would be worth.

I think the bill as a whole contemplated not only the Government would pay owners for private property which might be actually taken for levee purposes as a right-of-way, or as in this particular case to construct side levees, but also that if there was damage to the land within a spillway, either in this spillway or in the Bonnet Carre spillway or the one in Missouri, the Government would pay these damages.

I think the only question to be determined is whether General Jadwin was correct when he said there would be no damage, or whether the owners of the land are correct in saying that the land is actually damaged.

The complaint alleges that there is damage and sets out specifically what it is. *I have no doubt in my mind that under the Flood Control Act whatever damage can be established can be recovered in a proper suit against the*

*government.* The fact that the plan itself contemplated that these lands should be used as a flowage way is sufficient to show that the damage comes from their actual taking for public use, and therefore is the same as if they had taken the entire land and used it for a right-of-way. The only difference being that the measure of damage in the two cases would be different.

I think it is solely a question of proving whether these lands are in fact damaged or not by permitting water to flow through this uncontrolled fuse-plug spillway. If there is damage, it constitutes a taking of the property within the meaning of that term as applied to the Tucker Act. I am sure that was the *intention*, and the *opinion* held by almost everybody in the Congress which passed the bill. *Nobody wants to take private property and use it for flood control purposes without the proper compensation being made.*

There is a contention that the damage ought to be borne by the States. But it was recognized that the land that would be used in Arkansas would be for the benefit of Louisiana, and, in fact, of all lands along the Mississippi that might be overflowed and, therefore, it would be unjust to require Arkansas to bear that burden. For that reason, it was left as it is here. In order that local influences might not have any word in determining what the damage should be, it was provided that a commission should be appointed to fix the damage. That was at the suggestion of the Government because, if it had not been for that provision, those suits would have, of course, been tried to a jury instead of a commission. *Nevertheless everything in the bill was intended to protect those who*

*were damaged* if in fact there was damage, that was occasioned by the carrying out of this plan for the controlling of floods along the Mississippi. If that is not accomplished by the wording of the bill, it is because those who were interested in its passage were mistaken as to the meaning of the language placed in it. *I am sure that was the meaning intended at the time of its passage.* All the difference was, and that difference was not to be settled by the bill, is, was the land within this fuse-plug spillway damaged, *was its value reduced by the use which the Government was going to make of it.*

*I think the demurrer ought to be overruled.*

This opinion of mine may be to some extent influenced by the fact that I am familiar with the local conditions and the prevailing idea of those who were vitally interested in the passage of this measure. That fact I do not think in any way affects the propriety of my passing upon the case, because that information can come as well from a study of the record as it does from the facts as they existed there.

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## APPENDIX B.

## I. NATIONAL RESPONSIBILITY.

The Flood Control Act for the first time in history, deliberately assumes NATIONAL RESPONSIBILITY for the execution of ONE single comprehensive plan for flood control of the Mississippi River in its lower, alluvial valley. It is one, entire, unified NATIONAL PROJECT.

The Congress advisedly, deliberately, intentionally and expressly accepted NATIONAL RESPONSIBILITY, exercising EXCLUSIVE NATIONAL CONTROL, assuming complete GOVERNMENT LIABILITY, thus by legislation reversing the rule of former judicial decisions, rendering prior judicial precedents inapposite, nugatory and obsolete.

"The Mississippi River is the Nation's drainage ditch. Its flood waters, gathered from 31 States and the Dominion of Canada, constitute an overpowering force which breaks the levees and pours its torrents over many million acres of the richest land in the Union, stopping mails, impeding commerce, and causing great loss of life and property. *These floods are national in scope* and the disasters they produce seriously affect the general welfare."

Republican Party Platform, 69 Cong. Rec., Part 2, p. 1730; also 69 Cong. Rec., Part 3, p. 3465.

"We hold that the control of the *Mississippi River* is a national problem. The preservation of the depth of its water for the purpose of navigation, the building of levees to maintain the integrity of its channel, and the prevention of overflow of land and its consequent devastation, resulting in the interruption of interstate commerce, the disorganization of the mail service, and the enormous loss

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## APPENDIX A.

**OPINION OF UNITED STATES DISTRICT COURT,  
Eastern District of Arkansas, Overruling Defendant's Demur-  
rer in Case of J. Caroline Sponenbarger v. United States.**

Honorable John E. Martineau, District Judge:

It was early recognized that it was not possible for the States bordering on the Mississippi to control it, and that the only practical method of controlling its floods, if they could be controlled at all, was by the United States Government. In the various discussions and considerations of the bill, there were two plans suggested with reference to this particular spillway. I think all authorities, the Chief of Engineers representing the Government, recognized that the old system of levees was not sufficient to control the floods and there should be a diversion of the water of the Mississippi at the time of high waters. It finally got down, so far as this particular part of the levee was concerned, as to whether there should be a controlled spillway which would be very narrow, and really constitute another channel of the river, or whether there should be a fuse-plug spillway which plan was finally adopted as was recommended by General Jadwin.

One of the principal considerations in determining which of these plans should be adopted was the cost of the lands that were included within the spillway. If it were a controlled spillway and narrow, naturally the lands within it would be damaged, but there would be less land than if an uncontrolled spillway were built. General Jadwin contended that if you adopted his plan, that is this fuse-plug spillway, the damage to the land, the injury the

of life and property imposes *an obligation which alone can be discharged by the Federal Government.*"

Democratic Party Platform, 69 Cong. Rec., Part 2, p. 1730; also 69 Cong. Rec., Part 3, p. 3465.

"This is all one country. The public needs of each part must be provided for by the public at large. \* \* \* An adequate plan should be adopted to prevent a recurrence of this disaster in order that the people may restore to productivity and comfort their fields and their towns. \* \* \* The Federal Treasury should bear the portion of the cost of *engineering structures for flood control* that is justified by the *national aspects of the problem* and the *national benefits.*"

President CALVIN COOLIDGE to Congress, 69 Cong. Rec., Part 7, p. 7126.

"Congress derives authority to protect the Mississippi Valley from floods from section 8 of the Constitution, reading as follows:

"The Congress shall have power \* \* \* to provide for the common defense and general welfare of the United States; to regulate commerce \* \* \* among the several States; and to establish post offices and post roads."

"The situation was expressed very forcibly by General Jadwin, Chief of Engineers, in a recent speech at St. Louis in which he said: ' \* \* \* Now a comprehensive plan must be substituted and *control must be national.*' \* \* \* Federal jurisdiction must extend to all phases of the improvements."

"And the only solution is for the *Federal Government to assume full charge.* \* \* \* There is only one way to achieve success, and that is for the Federal Govern-

ment to adopt 'an adequate' plan, as the President so wisely suggests—'a comprehensive plan,' in the words of General Jadwin—*assume entire control and pay all costs.*"

Senator RANDELL, (La.), 69 Cong. Rec., Part 1, pp. 938-939.

"The Louisiana Purchase was made by Jefferson largely because he believed it was *essential to national unity* that the Mississippi River should come into the possession and be made part of the United States. As far back as 1845 we find speeches from John C. Calhoun referring to the flood conditions of the previous year, which he then said were too great for local enterprise; that *their control was a duty to be undertaken by the Federal Government.*" \* \* \*

"In the Mississippi Valley live more than one-half of the entire population of the United States. The valley contributes to the national wealth 68 per cent of the exportable products. In the valley is *the industrial center of the Nation*, the agricultural center near the confluence of the Mississippi and Illinois rivers, and the center of population in southwestern Indiana near the Illinois line." \* \* \*

"The drainage basin of the Mississippi is larger than the area of the whole of continental Europe. It is the world's most precious area. Its development in less than 100 years is probably the most remarkable chapter in this history of national growth." \* \* \*

"So precedent must be set aside and the Nation take the problem fully in hand and solve it as a national problem at national expense." \* \* \*

"Today a private citizen can not build a boat, a dike, a bridge, a dam, or revetment without permission from

*the National Government. Its authority is supreme; its control absolute."*

Senator HAWES, (Mo.) 69 Cong. Rec., Part 4, pp. 4395-4396.

*"It (the Mississippi River Commission, a purely Federal Agency, with practically arbitrary power) held to the view that in support of the 'levees only' theory every outlet of the river but one should be closed, and did succeed in closing them all except the Atchafalaya Gap and the mouth of the river at the Passes. \* \* \* It has been described as the monumental blunder of the age. \* \* \* But it was planned and executed by the Federal Government. \* \* \* Thus it will be seen that a policy fixed by the Federal Government itself is largely responsible, if not entirely, for the prostration of the lower valley today."*

Congressman REID, (Ill.) (Chairman House Flood Control Committee), 69 Cong. Rec., Part 5, p. 5645.

*"The nation recognizes this as an obligation everywhere accepted save here in Washington. It would seem that it is just as much a duty to protect the country from the ravages of floods as from the incursion of hostile armies."*

Senator CARAWAY; (Ark.) 69 Cong. Rec., Part 4, p. 3915.

*"Flood control on the Mississippi River is a single problem, and its solution can be secured only by unified treatment. The Federal Government is the only agency capable of doing the job. \* \* \**

*"The evidence before the committee showed that Tennessee was dependent in part for its protection upon levees in Kentucky, Arkansas is dependent on works which*

must be located in Missouri, and Louisiana in turn on levees in Arkansas. If we are to fight the river flood successfully, we must ignore State and local lines, because the river ignores them. *We must have a comprehensive plan under unified control and direction.* The character and location of the works must be determined by the need of *the entire valley* and not by the locality where built. Missouri, for instance, does not want a floodway from Birds Point to New Madrid. *Arkansas does not want some of its fairest territory turned over to the Boeuf floodway.* \* \* \* But the greatest good to the greatest number must be the basis for determining the location of these works and *only a Federal agency can make these decisions* and, in making them, the agency must be unhampered by local conditions."

Congressman SWING, (Calif.) 69 Cong. Rec., Part 6, p. 6717.

"Too much praise can not be accorded to Chairman REID, of the House Flood Control Committee, for so courageously maintaining that flood control is a *national problem*, and insisting that the entire cost should be borne by the Federal Government. A like measure of praise should be accorded Chairman JONES, of the Senate Commerce Committee, whose skill and ability resulted in a unanimous report of his committee and an equally *unanimous vote in favor of the bill in the Senate.*" \* \* \*

"I congratulate the committees of both branches of Congress that have framed this legislation upon having reached the conclusions that flood control is a *national problem* and that *the entire cost should be borne by the Government.* There can be no flood control with divided authority. Either the Government must take over the



problem and solve it, or we must look forward to disasters even worse than that of 1927."

Congressman MARTIN, (La.) 69 Cong. Rec., Part 6, pp. 6724, 6726.

"The Mississippi River does not belong to any State. It does not belong to Illinois, or to Missouri, or to Louisiana. It belongs just as much to us in New York, who are as far removed from it as any people in this Union.  
• • •

"The assertion that the local juries of the South will mulct the Federal Government in condemnation proceedings and would make awards higher than in the case of proceedings started by the State or local communities is a false slander upon the great patriotic people of the South."

Congressman O'CONNOR, (N. Y.) 69 Cong. Rec., Part 6, p. 6782.

"We all understand from the White House to this House, and everywhere else, that this is a national project, and we must treat it as such."

Congressman BLACK, (N. Y.) 69 Cong. Rec., Part 7, p. 7111.

"The problem, therefore, is a problem that can be handled only by the *Federal Government*, and the Federal Government has been derelict in its duty to an astonishing degree and over a great period of time. • • •

"Moreover, the Government has followed the policy of limiting its work to navigation and improvements incident thereto. It has utterly ignored the greater problem and the greater duty of controlling the flood waters and protecting the adjacent lands and property from injury, a policy which has always seemed to me to be narrow and stupid to the last degree. • • • as the Govern-

ment asserted its jurisdiction over these streams, it was for that reason alone in duty bound to harness and control the waters over which it asserted its dominance. \* \* \* Apparently, it took the lesson of this frightful catastrophe to finally awaken a real interest and a real understanding of the magnitude of the question involved. \* \* \*

"But I inquire now why it was that Congress was not convened and the great arm of this Government stretched out to protect people who were in no wise to blame for their condition, *people who were suffering largely because of the acts of the Government itself*, for it is now a conceded fact that in seeking to improve the Mississippi River the Government engineers closed certain great outlets for flood waters and by that act increased the menace of the flood.

"This problem \* \* \* is *national* in scope and must be handled by the *National Government* if it is ever handled effectively."

Senator REED, (Mo.) 69 Cong. Rec., Part 5, pp. 5294, 5295, 5296.

"I believe the hearings developed fully the fact that it is a *national question* and must be dealt with from that viewpoint. Then the next conclusion naturally follows that *the entire cost of construction should be borne by the Federal Government* by congressional appropriation.

"It is a *national problem* and as such should be considered. *All whom I have heard before the committee agreed to the national aspect of this subject*, and the only difference I find is the question of the division of costs and the extent to which the bill should apply. \* \* \*

"In so far as flood control alone is concerned, I believe the entire cost should be borne by the Federal Gov-

ernment, for it is a Federal question and affects all our citizens."

Congressman SWANK, (Okla.), 69 Cong. Rec., Part 1, pp. 1065-66; and 69 Cong. Rec., Part 7, p. 7419.

"Such a national loss (1927 flood) is indicative of a *national responsibility for prevention*. \* \* \* The Federal Government can well afford the price. By paying the price a *national benefit is bought*. The Federal Treasury is protected since no other drainage system can present to Congress similar characteristics that will warrant *exclusive national aid*. \* \* \* the flood-control work of the Mississippi Valley should be a *national project—designed, constructed, and paid for by the National Government*."

Senator SACKETT, (Ky.) 69 Cong. Rec., Part 1, p. 773.

"It is a *national problem* and the expense must be borne by the United States Government, because the States are not able to raise the necessary funds, and complications would hazard the completion of a constructive flood-control program. \* \* \*

*"The maintenance and control of the flood ways should be in the hands of the United States Government*

"The Mississippi Valley is the bread basket of the Nation, and supplies the East, West, North and South with food supplies."

Congressman HULL, (Ill.) 69 Cong. Rec., Part 2, pp. 2261-2263.

"If it be the policy of the Federal Government, the wisdom of which I have yet to hear denied, to exercise control over every part of the Mississippi River, does not

this *exclusive right to absolute control* carry with it a *corresponding duty to keep that river within its bounds?*  
 . . .

“Mr. Chairman, commerce decrees, humanity urges, duty impels, common sense dictates, and justice demands that absolute, complete, and entire control of the floods of the Mississippi River and its tributaries be *vested solely and alone in the Government of the United States.*”

Congressman COLLIER, (Miss.) 69 Cong. Rec., Part 2, p. 1731.

“In justice to everybody in the United States the Mississippi River must be controlled through levees and outlets, and it is my judgment that *all of the people of the United States should pay for this*, and that not one dime should be expected as further contributions from the people who have been suffering this burden during all of these years.”

Congressman QUIN, (Miss.) 69 Cong. Rec., Part 6, p. 6709.

“In the very beginning I want to say that *there has been no difference of opinion as to the necessity for flood control*; . . . a recurrence of such a catastrophe should be made impossible. . . .

“The Mississippi River is, of course, the most important stream in the United States. It stands in a class entirely by itself. . . . The Mississippi Basin contains 1,240,000 square miles, or about 41 per cent of the continental United States, and includes—in whole or in part—31 of our States.”

Congressman KOPP, (Iowa) 69 Cong. Rec., Part 6, pp. 6709-6710

"The suggestion that flood control be thought of as a national problem is not new." \* \* \*

"The Mississippi is one of the world's greatest rivers. It discharges three times as much water as the St. Lawrence, twenty-five times as much as the Rhine, and three hundred and thirty-eight times as much as the Thames. It has 54 tributaries that are navigable by steamboat and hundreds navigable only by small boats. The total mileage of navigable waterways and tributaries is estimated at 15,000 miles. At 2,000,000 cubic feet per second, flowing for a day, its waters would cover 620 square miles to a depth of 10 feet, \* \* \* and is equal to six times the water passing over Niagara Falls. It deposits at its mouth each year a mass of soil and silt equal to a square mile in extent and to a depth of 260 feet. It 'eats' annually about 91½ acres for each mile of its length. Obviously, no community, no State, can control such a force."

Congressman NELSON, (Mo.) 69 Cong. Rec., Part 6, p. 6669.

"Having entered upon the hearings with an open mind and no preconceived opinions upon any phase of the questions involved, after listening to the testimony for nearly three months and attempting at all times to weigh same as I would if a judge upon the bench, I have reached a very definite and fixed conclusion that *the Federal Government should bear the entire cost of the control of the flood waters of the lower Mississippi*, and I shall try to present the reasons actuating me in reaching that decision. \* \* \*

"The American people have become convinced and are now demanding that *the Federal Government should assume the sole responsibility for locating, constructing,*



and maintaining works to prevent floods upon the lower Mississippi, and that *the Federal Government should pay the entire cost of same.* \* \* \*

"First. Because it is a *national problem*, and hence a *national obligation* and a *national duty* which the Federal Government should discharge. \* \* \*

"Fifth. Because it is the will of the American people, whose representatives we are, that *the National Government should pay therefor.*"

Congressman JOHNSON, (Texas) 69 Cong. Rec., Part 5, p. 5334.

"Some say that it is not the affair of the United States Government to do this work. But who can stand idly by and see that land devastated and depopulated, business interests destroyed, commercial intercourse cut off, and people starved and degraded?

"It may be the naked legal right of the United States Government to stand thus idly by, but if it does it is not worth the name. And those who do so say do not represent American sentiment; they do not represent American patriotism. \* \* \*

"The conscience of the whole country has been aroused by the frightful destruction in the lower valley. *Nothing less than an adequate, comprehensive plan of 100 per cent flood control without local contribution will satisfy the people of this Nation.*" \* \* \*

"\* \* \* the flood of 1927 brought to us the realization that the solution of this problem had gone beyond the power of individual States or communities and had become *the Nation's duty.*"

Congressman REID, (Ill.) 69 Cong. Rec., Part 5, pp. 5608, 5616.

"So flood control has been recognized as a *national problem*, although it has been treated by the Government as incidental to navigation."

Congressman RAGON, (Ark.) 69 Cong. Rec., Part 5, p. 5125.

"Flood control and flood prevention are *national*, not State or local problems."

Congressman LOZIER, (Mo.) 69 Cong. Rec., Part 5, p. 5464.

"\* \* \* the terrible catastrophe of 1927, please God and the efficient purpose of the American people, *shall never occur again*. \* \* \*

"\* \* \* there is a conviction that the problem shall be considered as a *national problem*, that the Nation shall take vigorous initiative, that the administration of flood control in the Mississippi Delta henceforth shall be and must be a *national administration*, and the program of relief shall be a perfected project, looking forward to protection against not only such a gigantic flood as that of 1927, but against super-floods 25 per cent greater.

"Upon these matters there is a unity of purpose, of spirit, of thought that approaches the *unanimous*."

Congressman DAVENPORT, (N. Y.) 69 Cong. Rec., Part 6, p. 6715.

"The commerce clause of the Constitution is sufficient warrant for *complete national responsibility*, \* \* \*"

"It is inconceivable that a nation would permit an area of 40 to 50 miles wide and a thousand miles in length to be carved out of its very heart and feel that no national duty was involved. On this *national* aspect the question of recurring periods of destruction of life and property

is offered. Under the general-welfare clause this Nation can not permit this condition to continue."

Congressman DRIVER, (Ark.) 69 Cong. Rec., Part 6, p. 6787.

"And what an empire this Mississippi Valley, with all its tributaries, is—an empire that produces more than 100,000,000 people can consume! Rome ruled the world from Egypt to the British Isles, yet her eagles could not fly in a straight line as far as from New Orleans to Helena, Montana. Alexander conquered the world and was triumphant from the summit of the Alps to the foot of the Himalayas, yet he could not march his invincible phalanx in a straight line as far as from Pittsburgh to Santa Fe, *all within the watershed of this mighty river.*"

Congressman GUYER, (Kan.) 69 Cong. Rec., Part 6, p. 6774.

"\* \* \* this is the greatest undertaking that has ever confronted the National Government. It is, indeed, a stupendous task, and the *solution of the problem of flood control will mean more to the economic welfare and safety of the Nation than possibly any other one act that the Congress can perform.* \* \* \*

"It really was not until 1917 that the Congress recognized flood control of the Mississippi River as a part of the *national responsibility.*"

Congressman SINCLAIR, (N. Dak.) 69 Cong. Rec., Part 6, p. 6775.

"You are in the same position of a man who has a wild bull or a savage dog. All you have got to do is to keep that wild bull within the pasture or that savage or that mad dog in the pen. *This river is the river of the*

*United States.* The State of Illinois or the State of Arkansas or the State of Louisiana has no jurisdiction over it, can not legislate in any way in regard to it, and yet it is permitted by the United States, the only agency that has control over it, to run wild and do this harm."

Congressman (Chairman) REID, (Ill.) 69 Cong. Rec., Part 6, p. 6796.

See also *McIntyre v. Prater*, 189 Ark. 596, 74 S. W. (2) 639, holding: "Where one knowingly keeps a vicious or dangerous animal, he is liable for injuries inflicted by such animal without proof of negligence as to the manner in which the animal was kept."

"It therefore appears to be a *national responsibility*."

Congressman PRALL, (N. Y.) 69 Cong. Rec., Part 6, p. 6729.

"If flood control is a *national obligation*, as it undoubtedly is and is conceded by everyone, the obligation should be borne by the *Government* irrespective of locality and of a possible local benefit."

Congressman SPEARING, (La.) 69 Cong. Rec., Part 7, pp. 7027-7028.

"I am in favor of this flood control, and I expect to vote for it. It is a *national problem* and we should treat it as a *national problem*."

Congressman GREEN, (Fla.) 69 Cong. Rec., Part 7, p. 7121.

"Rivers and harbors, interstate and foreign commerce, and United States mails are all matters of *Federal responsibility*. The Mississippi and its tributaries is a great inland transportation system which, if controlled and utilized, is an invaluable asset to commerce and in-

ternal development in time of peace and one of our very greatest elements of national defense in time of war. . . .

"Defense of life and property of the citizen is *the highest national obligation.*"

Congressman LOWREY, (La.) 69 Cong. Rec., p. 7125.

"It is necessary to look upon this emergency as a *national disaster*. It has been so treated from its inception."

Congressman HERSEY, 69 Cong. Rec., Part 7, p. 7126.

" . . . the destruction wrought last spring upon the citizens of the Mississippi Valley was ghastly and horrible.

"In addition to the great destruction, interstate commerce was interfered with and our mail suspended and, all of these items taken into consideration, it has become a *national problem*. To a certain extent it is an international question. *It is the greatest producing region in the world*, and every factor which goes to make up the prosperity of the world is seriously affected."

Congressman CARTWRIGHT, (Okla.) 69 Cong. Rec., Part 7, p. 7127.

"Its nature makes it essentially a *national problem*. There is only one Mississippi River in the world."

Congressman REED, (Ark.) 69 Cong. Rec., Part 7, p. 7130.

"I believe the control of the Mississippi River is a *national problem* and that the cost thereof should be paid by the United States."

Senator ASHURST, (Ariz.) 69 Cong. Rec., Part 5, p. 5481.



"Everybody knows that *the Mississippi River drains about two-thirds of the territory of the United States.* From the summit of the Rockies on the west, and from the summit of the Alleghenies on the east, the waters of the rains that fall and the snows that melt find their way to that great drainage channel known as the Mississippi River."

Senator JONES, (Wash.) 69 Cong. Rec., Part 5, p. 5483.

"\* \* \* the American people realize the national character of the problem and *the duty of the Nation to pay its entire cost.*"

Senator RANDELL, (La.) 69 Cong. Rec., Part 5, p. 5492.

"\* \* \* this is a *great national problem*; that in the interest of *commerce*, in the interest of *navigation*, in the interest of *business* generally, in the interest of *national defense*, the *mail service*, and for other reasons, it is without question a *national problem.*"

Senator STEPHENS, (Miss.) 69 Cong. Rec., Part 5, p. 5493.

"This Government has no right to lay the hand of special taxation upon the flood-afflicted people of the Mississippi Valley and add to their already heavy burden by collecting taxes from them to aid this great Government in doing its simple duty toward solving a *purely national problem.*"

Senator HEFLIN, (Ala.) 69 Cong. Rec., Part 5, p. 5493.

"\* \* \* this question (Mississippi River flood control) is distinctly a *national question* in every sense of the word."

Senator MAYFIELD, 69 Cong. Rec., Part 5, p. 5294.

"\* \* \* the sentiment of the country had crystallized upon the proposition that it was the duty of the *Nation* to take charge of this great system of waterways, and to safeguard it for all time to come from the possibility of such a disaster as took place in 1927."

Senator SIMMONS, (N. C.) 69 Cong. Rec., Part 5, p. 5297.

"It is universally conceded that the problem is of national importance and that it must be *constructed* by the Government without delay. \* \* \* Hearings were begun by the House committee on November 7, 1927, and over 300 witnesses were heard during the ensuing three months. Their testimony was strangely cumulative, for, as shown by the record, nearly all declared with unanimity that this is a *national problem* and should be built of *national expense*."

"*It is a national problem.*"

Congressman FREAR, (Wis.) 69 Cong. Rec., Part 6, pp. 5869, 6655.

"There should be *one responsibility* as the report of the House committee suggests, and I have always contended that *the responsibility rests with the Government*."

Congressman COCHRAN, (Mo.) 69 Cong. Rec., Part 6, p. 5998.

"The problem of flood control is clearly national, not local. *It is the Nation's job.*"

Congressman ASWELL, (La.) 69 Cong. Rec., Part 6, p. 6111.

"Whatever adequate flood control shall cost the safety, peace, and prosperity of the Nation demands it. It is a *national necessity*, and like the Panama Canal we must

meet the emergency and do it. . . . everyone admits that flood control on the Mississippi is a *national problem*."

Congressman HOWARD, (Okla.) 69 Cong. Rec., Part 6, p. 6311.

" . . . the control of the flood waters of the Mississippi River in its alluvial valley is a *national problem*—the greatest internal project in America—and should be undertaken by the *National Government*. . . .

"*Abraham Lincoln* said: 'The driving of a pirate from the track of commerce in the broad ocean and the removing of a snag from its more narrow path in the Mississippi can not, I think, be distinguished in principle. Each is done to save life and property and to use the waterways for the purpose of promoting commerce. *The most general object I can think of would be the improvement of the Mississippi River and its tributaries.*'"

Congressman WILSON, (La.) 69 Cong. Rec., Part 6, p. 6644.

"The harnessing of the flood waters of the Mississippi is conceded to be our greatest domestic problem. . . . American public opinion is unanimous. Harnessing and curbing the Mississippi River is the *responsibility of the Nation*."

Congressman WHITTINGTON, (Miss.) 69 Cong. Rec., Part 6, pp. 6649-6650.

"The Mississippi is the world's greatest and most useful river." . . .

"In Louisiana not a drop of water enters the Mississippi River from where the Red River enters the Mississippi to the Gulf of Mexico, a distance of 300 miles. All the rainfall in Louisiana, Arkansas, and Mississippi

could have been carried safely to the Gulf for a small part of the money these States have spent in levee construction, but the floods from the Rockies, the Alleghenies, and the Great Lakes have swept down periodically, have swollen the current, broken the levees, and carried death and destruction in their wake. The States of the lower valley have already spent more than enough money to protect themselves from floods that originate in their territory. . . .

"The leading statesmen and the conspicuous business leaders and organizations of the Nation have said that flood control is a *national problem*, and that it is an injustice for the States of the lower valley to combat the flood waters of almost half the continent."

*"Flood control is a national problem."*

Congressman WHITTINGTON, (Miss.) 69 Cong. Rec., Part 4, pp. 4134, 4141, 4138.

"National responsibility for the control of the Mississippi is not a new idea, born of the tragedy of 1927. It dates back to the very first days of this Republic. *Washington* and *Jefferson*, by word and action, made it plain that this greatest river of our continent was for the *Nation* to use and to control. The early statesmen of this Republic emphasized this responsibility of the Government for the river.

"'If the system be not national,' said *Henry Clay* once in the United States Senate, 'I should like to know one that is national.'

"*President Lincoln* said: 'The most general object I can think of would be the improvement of the Mississippi River. The statesmanship of America must grapple with the problem of this mighty stream.'

"Said *President Garfield*: 'It is too vast for any State to handle; too much for any authority other than that of the Nation itself to manage.'

"*President Roosevelt*, after a visit to the valley, said: 'We must build the levees and build them stronger and more scientifically than ever before.'

Congressman WILSON, (Miss.) 69 Cong. Rec., Part 3, p. 3465.

"\* \* \* flood control in the Mississippi Valley is national in scope and \* \* \* it is a problem of *Federal responsibility*.

"The Secretary of Agriculture in his annual report states that it is his conviction that—'Prevention of future disastrous floods is *an imperative national problem*.'"

"General Jadwin in his report says: 'The control of the Mississippi River has developed from a local problem to a *national problem*.' \* \* \*

"The Mississippi River and its tributaries are national assets, Government owned and Government controlled. Why should not the expenses be a Government responsibility?"

Congressman FULLBRIGHT, (Mo.) 69 Cong. Rec., Part 3, pp. 3400-3401.

"I concur in the repeated statement that this is a *national question*."

Congressman HASTINGS, (Okla.) 69 Cong. Rec., Part 7, p. 7012.

"Flood control on the Mississippi is *indeed a national problem*, and if this bill becomes the law, as I have every reason to believe it will, the *Federal Government* will meet and do its duty fully."

Senator McKELLAR, (Tenn.) 69 Cong. Rec., Part 5, p. 5495.



The foregoing statements clearly declare the composite mind of the Congress which enacted the Flood Control Act of May 15, 1928. Many additional quotations to the same effect could be taken from the congressional debates; but, suffice it to say, we find no record anywhere in the congressional debates suggesting that any member of Congress undertook to controvert any of the statements quoted. It is an indisputable fact that *national responsibility* was recognized and *accepted* by the United States, the present petitioner, by the passage of the Flood Control Act of May 15, 1928.

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## II. *Congress contemplated, and intended, LIABILITY.*

That the Congress, and the Congress alone, is authorized to speak for the petitioner United States, and shape its policies, is beyond question. When Congress deliberately assumes contractual liability on behalf of the Government no Court has the moral right to deny that liability.

Congress intended by the language of section 4 of the Flood Control Act to require payment by the United States of compensation for the servitude taken, viz., the "flowage rights." For this *right* to artificially overflow or flood their property—regardless of when, or how often used, if ever—the Government purposed, and expressly provided, that the property owners in the floodway should be paid. Congress desired to avoid any possible controversy as to whether or not such owners of property would be adequately protected by the provisions of the Fifth Amendment of the Constitution. Congress intended that "just compensation" for the "property" "taken" should be liberally construed to cover all *damages* sustained by the

property owners; notwithstanding, under former judicial decisions, the United States might not have been liable for such damages.

No informed mind can possibly doubt these facts after reading the official utterances quoted in the main brief (Point V, B, 2), and the following additional official excerpts.

1. Congressman WILSON, (La.) of the House Flood Control Committee, in explaining the intention of Congress, and the meaning of the Act, after quoting section 4, said:

"For the first time in history *the Federal Government assumes responsibility, at its own expense*, for the protection and security of the alluvial valley of the Mississippi River from destructive floods, \* \* \*.

"It was not the intention of the Senate or the House in the passage of the bill which was finally signed to subject the Government to any expenditures that were not fair or necessary in the execution of the project when finally adopted, and especially that phase of it dealing with diversions, spillways, and floodways. *The conclusion was reached that such diversions when planned, made, and executed by the Government should be entirely at national expense and national responsibility.* It was realized that when the Government undertook the control of the flood waters of the Mississippi River as a national function, under the Constitution, that it could and had the authority to construct and plan the works necessary to effect that purpose. The object and intention of section 4 is that *the Government shall provide the rights-of-way and construct the protective works where flood waters*

are to be diverted and shall provide *flowage rights* for additional destructive flood waters that will pass, *not normally, but by reason of diversions from the main channel of the river*. It is true that the word 'additional' negatives the idea that the Government would be called upon to pay for flowage rights over natural channels or over lands flooded in normal years.

"The contention has been made that certain sections of the valley are *natural floodways* and therefore should be used for the protection of other portions of the valley. *This is not true*. Natural channels are the only portions of the valley that could be termed natural floodways as distinguished from other portions. *Before levees were constructed the entire valley could have been termed a natural floodway* and in the flood of 1927, 18,000 square miles of the 30,000 square miles in the alluvial valley operated as a floodway. \* \* \* Destructive flood waters is that volume which passes out of the natural channel; *additional destructive flood waters is that volume which is deliberately diverted on the plans of the Government over a section of the valley not overflowed in normal years*. So it naturally follows as a matter of justice, clearly expressed by Congress, that *whatever rights-of-way and flowage rights are found necessary to carry out the purposes of the act shall be provided by the Government*." 69 Cong. Rec., Part 8, pp. 8210, 8211.

2. Mr. O'CONNOR of Louisiana. "Why should not the Government bear the full cost of acquiring and operating spillways? If the engineers had recommended exclusively larger and stronger levees, I do not think the recommendations would be taken seriously by the House. \* \* \*

"Without the *spillway site*, which, in my judgment, is *sine qua non* and *absolutely essential* in order to make for the success of the new plan, we might as well not legislate on the plan. Therefore the spillways, being a part of the whole system and being for the benefit of the whole river, should be considered a part of it and should not be looked upon merely as a local proposition, \* \* \*.

"Mr. TILSON. The gentleman means by spillways not only the site where it leaves the main river but *the entire land that would be covered by these overflows*? That is what the gentleman means by spillways?

"Mr. O'CONNOR of Louisiana. Yes; all of the land covered by these overflows through what is known as a spillway.

"Mr. TILSON. And the gentleman's idea is that *that should be paid for as a part of the expense*, the same as the levees?

"Mr. O'CONNOR of Louisiana. *I think so.*

"Mr. TILSON. Then to whom would this land belong?

"Mr. O'CONNOR of Louisiana. To the *National Government*. There should be *national responsibility in toto*. I do not think the States or local communities ought to have anything to do about it, because it is a national proposition.' 69 Cong. Rec., Part 1, p. 765.

3. "The bill authorizes an appropriation of \$325,000,000 and provides that *just compensation shall be paid by the United States for all property taken, damaged, or destroyed in carrying out the plan in the bill.*" Congressman SWANK, (Okla.) 69 Cong. Rec., Part 7, p. 7119.

4. "Mr. RAGON, (Ark.). With reference to the rights-of-way for these spillways and levees, is it the gentleman's thought that the local unit or the landowners should pay for them?

"Mr. WILLIAM E. HULL, (Ill.). *No, sir; I did not say that. It is just the opposite. You take Louisiana, which gets most of the floodways. I know that the people in that State have not the money with which to pay, so I think the State should make arrangements whereby the Government can purchase the floodways on the basis of tax valuation. In other words, they have got to make their laws so you can go through with the floodways, and then the Government furnishes the money to pay for them. Then, after a while, it may be possible to resell those lands. . . .*

"Mr. RAGON. Does the gentleman mean that the money would be given by the Government or advanced as a loan?

"Mr. WILLIAM E. HULL. It would be given outright by the Government. *The lands would be purchased by the Government, and if the lands were resold the money would go back into the Treasury of the United States.*"  
69 Cong. Rec., Part 2, p. 2263.

5. Before the final passage of the Act, the fight for local contribution was led by Congressman FREAR, (Wis.). Yet even he, speaking for the minority, readily conceded that *somebody* should pay for all damage done to property in the floodways.

"*Any additional damage caused by the Government should be paid, so far as the damage is concerned. The only criticism that rises in my mind is whether or not*



the Government should buy the flowage rights instead of permitting the damage to be recovered by court action." 69 Cong. Rec., Part 8, p. 8120.

"Next, as to this section 4, the proposition of damages. When it once goes in force you will have bills without limit presented to the United States, and you will have to try them by local juries just as you try the ownership of lands and their values. It is all to be done at Government expense." \* \* \*

"There is in the neighborhood of 4,000,000 acres to be given for this floodway. I believe it ought to be turned over to the States. I would be perfectly willing to loan money to the States to pay a portion of it, although I believe the States ought to assume it themselves." Congressman FREAR, (Wis.) 69 Cong. Rec., Part 6, p. 6779.

Congressman FREAR even read into the record a detailed list of the property owners who would be entitled to damages, with the acreage of each, and the total cost to the Government. (69 Cong. Rec., Part 6, pp. 5870-78.) There was no question whatever but that compensation was due these landowners from some source for their property which was dedicated as a public floodway by the Jadwin Plan for flood control.

"Mr. COX. The gentleman opposes the bill, for one among many reasons that it provides that the Government shall acquire rights-of-way. I would like to inquire of the gentleman if he favors the taking or damaging of private property for public use without compensation?"

"Mr. FREAR. *Why, no; certainly not.* I believe if this land is damaged beyond what it has been under the

original overflowing of these floodways, *the Government should pay for that damage, \* \* \** Congressman FREAR, 69 Cong. Rec., Part 7, p. 7000.

6. "Mr. LaGUARDIA. \* \* \* When the gentleman from Illinois (Mr. REID) points out that we should not permit land to be acquired without just compensation, he knows that neither the Federal Government nor a State Government can take the property of any citizen without due compensation.

"Mr. REID of Illinois. And the gentleman knows that property can be damaged by the Government without paying compensation. \* \* \* And that is what you intend to do here.

"Mr. LaGUARDIA. There is no one who contends that property should be taken without compensation. *There is no one who contends that property that is damaged by the work of the Government should not be paid for*, but we do object to going in and paying an excessive, exorbitant price for 3,700,000 acres of land now already in the hands of speculators or soon to get into their control." 69 Cong. Rec., Part 7, p. 7002. \* \* \*

7. "It is our boast that there is no wrong without a remedy. This is a vain boast unless the Federal Government does its whole duty to the people of the lower Mississippi Valley."

"I want to agree with my colleague from New York (Mr. O'CONNOR) that it is a sad commentary on this House if the United States Government cannot get justice in its own courts. If anybody will stand up and say you cannot get justice in your own courts, what kind of flim-flam have you been putting over on the people when

you have led the people to believe that the United States courts are integrity itself, that no one in any way could put anything over either on the judges or juries, and that *protection to the ordinary individual is their supreme guaranty*; and that if the Federal courts undertook to do a thing they would do it right. I have heard no scandals connected with our United States courts in any way, and I am surprised that any Congressman would even think of it." Congressman REID, (Ill.) 69 Cong. Rec., Part 6, pp. 6792, 6795.

8. "As expressed in the brief filed by Governor Martineau, of Arkansas, in referring to the Boeuf Basin floodway proposed by General Jadwin, which would flood over two and a half million acres, much of it productive land, and destroy many cities and towns in Arkansas in order to protect a portion of the State of Mississippi, Arkansas is being asked to '*pay a portion of its own funeral in order that other sections may survive.*'" Congressman REID, (Ill.) 69 Cong. Rec., Part 6, p. 6792.

9. "General Jadwin said he would turn the water down on those people and let them take their chances." Congressman REID, (Ill.) 69 Cong. Rec., Part 7, p. 7106.

"Under the Jadwin plan, if the river overflowed, you could go down here and take all of the property along Pennsylvania Avenue and say you have a right to do it because this was the natural floodway once, and that you have a right to put it in there again." Congressman REID, (Ill.) 69 Cong. Rec., Part 6, p. 6791.

"Such inequities and injustices in the Jadwin plan convince the committee that the legislatures of the valley States will never agree to it, and that, therefore, no flood-

control work will be done, \* \* \*” Congressman REID, (Ill.) 69 Cong. Rec., Part 5, p. 5613.

*“There is but one just and honorable way to handle this situation; that is, to pay these people for their lands, or acquire the flowage rights, and pay for the resulting damage to drainage system, highways, railroads, etc.”* Congressman REID, (Ill.) quoting from brief by Governor Martineau of Arkansas, 69 Cong. Rec., Part 5, p. 5649.

10. *“The flood problem has become a proposition to be dealt with as a national question and at national expense. Practically everyone is agreed upon this. \* \* \* If wider channels are needed, the land should be purchased.”* Congressman MORROW, (N. Mex.) 69 Cong. Rec., Part 5, p. 5321.

11. *“We also ought to have confidence enough in our own Federal courts to know that there will be no hold-up on the purchase of rights-of-way. The actual values should be paid to the owner, because it is unthinkable that we should take the land of one person in order to protect the property of another. \* \* \** It will not be a case comparable to juries rendering excessive damages against railroad companies, because in the first place juries will not be used under this law but only appraisers appointed by the judge. The honor and integrity of the Federal judges cannot be impugned.” Congressman SWING, (Calif.) 69 Cong. Rec., Part 6, p. 6717.

12. *“I want to answer the argument that the gentleman from New York (Mr. LaGUARDIA) has just made. It is a repetition of an argument made by other Members*

was no great Federal project for a comprehensive flood control," \* \* \*

"We all understand from the White House to this House, and everywhere else, that this is a national project, and we must treat it as such; \* \* \*" Congressman BLACK, (N. Y.) 69 Cong. Rec., Part 7, p. 7111.

In opposing this Amendment, Chairman REID, (Ill.) said:

"Mr. Chairman, the intent may be all right in this amendment, but the way it is worded and the place at which it is to be put into the bill will destroy all of the safeguards the distinguished leaders on this side of the House have tried to keep in the bill. Under the law at the present time, of course, benefits are to be considered. Under this amendment you would have to consider benefits before the improvement was thought of. Consequently benefits would not be taken into consideration. Of course, you could not violate the Constitution and the law and prohibit anybody from being an assignee to any rights, and prevent any payment to that person. It is inconsistent with my idea of ordinary law." 69 Cong. Rec., Part 7, p. 7111.

*Congress rejected this Amendment*, as it did all other amendments seeking to hamper or limit the right of the property owners in these floodways to collect from the Government just damages and compensation. 69 Cong. Rec., Part 7, pp. 7112-7113.

15. "This fear expressed here today that the Federal Government is not able to take care of itself in condemnation proceedings strikes me as something that never should fall from the lips of a lawyer. This indictment of the people of the South, that their local juries in the South are not



composed of patriotic citizens of this country, should be stricken from the RECORD. The assertion that the local juries of the South will mulct the Federal Government in condemnation proceedings and would make awards higher than in the case of proceedings started by the State or local communities is a false slander upon the great patriotic people of the South." Congressman O'CONNOR, (N. Y.) 69 Cong. Rec., Part 6, p. 6782.

16. "Mr. JOHNSON of Texas. And does not the bill also provide that instead of having juries to assess the damages the Federal court shall appoint three commissioners, who shall determine the values, and that their judgment shall be final?

"Mr. DRIVER. Yes; and I want to say to you that I will support any amendment that may be offered to this bill that will provide the machinery to insure a fair measure of value for these lands." 69 Cong. Rec., Part 6, p. 6783.

17. "One illustration will suffice to present the general influence. The Southeast Arkansas Levee District comprises 727,264 acres, of which 290,905 acres are in a state of cultivation. *The Jadwin plan proposes to dedicate 225,000 acres of the lands of such district to the Boeuf River floodway.* This land is now charged with levee and drainage liens equal in acreage to the other lands of the district. It comprises slightly more than one-third of the area of the district. Even though the amount of the present liens be relieved against through the purchase of the same for floodway purposes, the annual revenues of the district in the future will be diminished to the extent of more than one-third and leave to the district through such lessened revenues an inadequate sum to pay the expenses connected

of the House during this debate. The argument is, if this bill passes with a provision that the Federal Government shall acquire an interest in lands necessary for rights-of-way, it will have to take it at a valuation based upon an anticipated public improvement.

"I want to say, and particularly for the benefit of the gentleman who has just addressed the House, and who knows the law, that the Supreme Court of the United States in the case of the *United States v. The Chandler-Dunbar Co.*, (229 U. S. 55), made this holding:

"'One whose property is taken by the Government for improvement of navigation of the river on which it borders is not entitled to the probable advanced value by reason of the contemplated improvement. *The value is to be fixed as of the date of the proceedings.*'" Congressman COX, (Ga.) 69 Cong. Rec., Part 7, p. 7021.

### 13. The LaGUARDIA Amendment.

Congressman LaGUARDIA (N. Y.) took the position that the damage done to property in the floodways should be paid for by the lands which were protected by the flood control project. He said:

"I shall suggest at the proper time a plan whereby the 18,000,000 acres in the area of the benefit in the various States could pay for the 3,000,000 acres necessary for floodways and spillways in accordance with the plan in the bill. Let each State affected contribute *the amount necessary to pay for the spillways and floodways* in proportion to the acreage within the State directly benefited." 69 Cong. Rec., Part 6, p. 6724.

Congressman LaGUARDIA did introduce such an Amendment, but it was *rejected* by the Congress. 69 Cong. Rec., Part 7, p. 7030.

#### 14. The BLACK Amendment.

Congressman BLACK, (N. Y.) offered an amendment to provide:

"But in no case shall the damages exceed the market value of such property as of the date of this act, and as if the United States were not to undertake any comprehensive plan of flood relief. No awards shall be paid to any person taking title to affected property after the passage of this act, except through a judgment of a court of competent jurisdiction nor to assignees of anticipated awards. The Secretary of War shall employ such experts and engineers as to him may seem necessary in the conduct of such condemnation proceedings and benefit proceedings as are provided by this act." 69 Cong. Rec., Part 7, p. 7111.

In support of this amendment, Congressman BLACK urged:

"By this amendment I fix a rule of evidence. I say that the value of the property taken shall be the market value as of the date of the passage of this act, and, further to guard against high speculative damages, I say that when the property is taken its value must be considered as if the Government never thought of putting through any comprehensive flood-relief plan. Lawyers who know anything about condemnation work understand that in measuring the value of property you can take into contemplation any potential utilization of that property. I want this amended so that a man whose property is taken by this plan cannot say to the court that if the plan was shifted his property would be three times as valuable. That is the reason I want it understood that the property shall be taken as if there

with the operation of the agency." Congressman DRIVER, (Ark.) 69 Cong. Rec., Part 6, p. 6786.

18. "Under the Constitution as provided in the Fifth Amendment thereto, private property can not be taken for public use without just compensation. That phrase fixes the damages to which everybody is entitled in condemnation proceedings when property is taken for public use by the United States Government. \* \* \*

"The retention of section 4 as it now reads will mean a vast amount of litigation and ultimately great loss to the Government. \* \* \* *Everybody is entitled to just damages*, and the courts of the country have interpreted that phrase many times and have laid down rules for ascertaining just damages.

"*All of the language in section 4 of the bill enlarging the rule of damages fixed by the Constitution of the United States should be stricken out.*

"The railroads are entitled to their rights. Nobody would take any away—nobody could take them away. They are fixed by the Constitution of the United States." Congressman KOPP, (Iowa) 69 Cong. Rec., Part 6, p. 6712.

19. "The major portion of these lands where floodways are to be placed are not particularly valuable lands and the prices should be reasonable. *It should not be the policy of the Government to confiscate a man's property by running water over it without reimbursing the landholder*, but, on the other hand, the landholder should not be paid in excess of the true valuation of the property, \* \* \*." Congressman FULL, (Ill.) 69 Cong. Rec., Part 6, p. 6718.

20. "For myself I am perfectly willing, although everybody on this side may not agree with me, that *the*

*Government should pay for the flowage rights in the floodways."* Congressman MADDEN, (Ill.) 69 Cong. Rec., Part 7, p. 7003.

21. "Mr. MADDEN: Mr. Speaker and gentlemen, yesterday afternoon I introduced an amendment to the flood control bill which provided that when southern Illinois and southeastern Missouri and New Orleans assumed the responsibility of relieving the Government of any damages by reason of the work of construction which the Government was about to enter upon, then the work would proceed under the bill which we are considering. The House rejected this amendment.

"Since then, I have talked with the President, who says *he will not insist upon the conditions laid down in the amendment* which I proposed to the committee, and therefore I want to state to the House, in all good conscience, I have no valid reason that I know of for voting against the bill, and I propose to vote for it." Congressman MADDEN, (Ill.) 69 Cong. Rec., Part 7, p. 7096.

22. "Is not all this discussion upon the basis that *the property owner shall be reimbursed for the actual damage that he sustained?* Is there any doubt that if an amendment is needed to the law to give that actual effect, that the Congress will be ready to send him to the courts to determine what the actual damage is that he has sustained?" Congressman DEMPSEY, (Ill.) 69 Cong. Rec., Part 7, p. 7108.

23. "The fatal objection to the Jadwin plan is that it recommends that the States and districts agree to hold and save the United States free from all damages resulting from the construction of the project, and particularly in the



building of the diversions. This is *an impossibility*." Congressman WHITTINGTON, (Miss.) 69 Cong. Rec., Part 6, p. 6652.

24. "It was a monumental error to close Cypress Creek. It was a natural outlet. It traverses the lowest ground for spilling the waters of the Mississippi River. *As a part of any flood-control scheme it should be reopened and just compensation made by the Government to the people who have improved lands as a result of Cypress Creek being closed.* \* \* \* All engineers agree that at least 600,000 cubic feet should be diverted through the Cypress Creek outlet \* \* \*. *The Government should bear the expense incident to the diversions.*" Congressman WHITTINGTON, (Miss.) 69 Cong. Rec., Part 4, p. 4139.

25. GOVERNOR JOHN E. MARTINEAU, late United States District Judge in Arkansas, in his written brief filed with the House Committee on Flood Control (Part 4, p. 2500), said:

"The Jadwin report takes the position that the lands within the spillway area are not damaged and should be paid no damage. This, we consider, is the major economic mistake of the Jadwin plan, as *unquestionably the owners of the lands will have to be paid for damages for flowage rights.*"

Testifying personally before the Senate Committee on Commerce on the same Flood Control Bill, Governor (later U. S. District Judge) Martineau, said:

"The Jadwin plan further assumes that the lands that fall within these flowage ways will not be damaged by reason of the peculiar method of constructing them. *There never was a greater mistake made than that.* Every man

who owns land in these flowage ways recognizes that when it is placed where it is constantly subjected to an overflow without any protection, that *its value at least for agricultural purposes is destroyed.*"

26. "I regard the enactment of the flood control act of 1928 as the most constructive piece of legislation written upon our statute books during my five years in Congress. It was a matter of great satisfaction to me that the Congress stood steadfast by *the main proposition*, namely, that flood control to be effective must be *nationalized in the fullest sense of the term*. While we yielded to the President on many details, I am glad that Congress stood by *its main contention*, that *the Federal Government assume the total cost* and that no local assessments be levied.

"I am happy that the President signed the bill, but I am satisfied in my own mind that if he had not done so the Congress would have overridden his veto, *so strong was the sentiment in this country and this Congress for flood control of an effective kind.*" Congressman JACOB-STEIN, (N. Y.) 69 Cong. Rec., Part 8, p. 8584.

"The intention of the lawmaker is the law." *Hawaii v. Mankichi, supra.*

### III. Not a Reclamation Project.

Petitioner's (defendant in District Court) requested Finding of Fact No. 19 seeks to have the court assert: "The proof shows that the Boeuf Basin has always been a flood-way" (R. 356). On this false premise petitioner's counsel base their plausible, but fallacious, argument that the United States is not liable to appellant merely because the Government *failed to reclaim* her property from the natural and ancient flood bed of the Mississippi River.

General Jadwin was a victim of the same sophistry. Witness his statements: "The land in question (Boeuf Floodway) was originally an overflow channel of the Mississippi, and it must be available for the use of the river in extreme flood" (Doc. 90, sec. 120), and "The lands in the floodway \* \* \* will retain the same measure of protection that they now have." (Doc. 90, sec. 119.)

Of course it is wholly immaterial in determining the legal issue of liability on the part of the Government for the alleged "taking" whether respondent's land is undeveloped, overflow, swamp land with only nominal value, or highly improved agricultural land in actual production worth \$500 an acre. That would go only to the measure of damages. But it is important for the court to know that respondent is *not* seeking to force the Government to *reclaim* her property from an unprotected flood area, like the lands between the levee lines of the river or the reservoir overflow lands in the backwater areas at the mouths of the tributaries (as the White and Arkansas) which have never been reclaimed for development, use and cultivation.

The reclamation of respondent's property began generations ago and was *completed* when the gap in the levee lines at the mouth of Cypress Creek was closed in the year 1921, six years before respondent bought her property.

Even General Jadwin, somewhat inconsistently, takes notice of this long since completed reclamation, reminding the Congress: "The values and population behind the levees are increasing all the time. It has been estimated that damages from the 1927 flood were over \$200,000,000." (Doc. 90, sec. 27). Again: "The loss of life and property in the recent great flood in the alluvial valley followed the break-

ing of the levees which reclaimed the land for the use of man. This *reclamation* had been pushed so far that insufficient room was left in the river for the passage of the unprecedented volume of flood water." (Doc. 90, sec. 6.)

The most conclusive refutation of this unfair, prejudicial, specious argument that respondent's property must be regarded as lying in the natural high-water bed of the river and therefore subject to the Government's use at pleasure without liability, is found in the decision of the Supreme Court of the United States to the contrary. See *Cubbins v. Mississippi River Commission*, 241 U. S. 351, 36 S. Ct. 671, 60 L. ed. 1041, at p. 1049, hereinafter quoted by Congressman Cox.

*Congress also rejected this theory so inconsistent with the actual facts.*

1. "It has been stated that flood control is a *reclamation* matter; that it confers special benefits to special land-owners and should be paid for by them. No one who has investigated the subject ever made such claim. It is merely an ignorant assumption unsupported by facts."

Senator HAWES: 69 Cong. Rec., Part 4, p. 4396.

2. "The opposition have said in effect that this legislation will confer a great benefit upon the people who transgressed upon the natural flowage rights of the river; that the river was in existence when the people settled there; and that this is a reclamation project proposed to be carried on for the special benefit of the people who live near the river from its source to where it empties into the Gulf. . . .

"I should like in reply to this argument to quote from what I think is quite respectable authority, that is, from

a decision of the Supreme Court of the United States found in volume 241 of the Supreme Court Reports, page 368, a decision rendered by Mr. Chief Justice White, one of the most distinguished jurists ever occupying that high position:

“ ‘Indeed, from the face of the bill, it is apparent that the rights relied upon were assumed to exist upon the theory that the valley through which the river travels, in all its length and vast expanse, with its great population, its farms, its villages, its towns, its cities, its schools, its colleges, its universities, its manufactories, its network of railroads, some of them transcontinental, are virtually to be considered from a legal point of view as constituting *merely the high-water bed of the river*, and therefore, subject, without any power to protect, to be submitted to the destruction resulting from the overflow by the river of its natural banks. \* \* \*

“ ‘In fact, the nature of the assumption upon which the argument rests is shown by the contention that the building of the levees under the circumstances disclosed was a work not of preservation but of *reclamation*—that is, a work not to keep the water within the bed of the river for the purpose of preventing destruction to the valley lying beyond its bed and banks, but to *reclaim* all the vast area of the valley from the peril to which it was subjected by being situated in *the high-water bed of the river*. If it were necessary to say anything more to demonstrate the *unsoundness of this view*, it would suffice to point out that the *assumption is wholly irreconcilable with the settlement and development of the valley of the river*; that it is at war with the action of all the State Governments having authority over the territory, and is a complete denial of the legisla-



tive reasons which necessarily were involved in the action of Congress creating the Mississippi River Commission and appropriating millions of dollars to improve the river by building levees along the banks in order to confine the waters of the river *within its natural banks*, and by increasing the volume of water to improve the navigable capacity of the river'."

(*Cubbins v. Mississippi River Commission*, 241 U. S. 351, 36 S. Ct. 671, 60 L. ed. 1041, at p. 1047.) Congressman COX, (Ga.) 69 Cong. Rec., part 6, p. 6720.

3. "The Committee on Flood Control, to which was referred the bill to prevent destructive floods which cause the loss of life and property, interrupt interstate commerce or delay the United States mails; and to prevent the recurrence of a flood such as that of the Mississippi River in 1927, which resulted in the loss of more than 246 lives, drowned out hundreds of cities, towns, and villages, drove 700,000 people from their homes, rendering them objects of charity dependent upon the Red Cross and other agencies, inundated 18,000 square miles, destroyed 1,500,000 farm animals, caused losses amounting to many hundreds of millions of dollars, suspended interstate freight and passenger traffic, prevented telegraph and telephone communication, delayed the United States mails, and paralyzed industry and commerce, having considered, the same, report thereon with a recommendation that it do pass, \* \* \*."

Chairman REID, 69 Cong. Rec., part 5, p. 5616.

4. "There is no connection between this project of flood control and a reclamation project. \* \* \*

"The assumption that the project should be paid for in the same manner as reclamation projects can not be

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sustained upon the facts. A reclamation project has for its object the reclaiming or bringing into existence lands theretofore not susceptible of cultivation, while the lands herein involved have been in cultivation for hundreds of years. This is not reclamation but *preservation*. \* \* \*

"This is *not a reclamation project* but is a humanitarian one, pure and simple, and the United States should *not attempt to drive a hard bargain when the safety and welfare of so many of its citizens are at stake*. Shall it, like Shylock of old, demand its pound of flesh for its ounce of gold, *especially when this work is made necessary to correct the mistaken policy of the Government itself in the control of the Mississippi River?*"

Congressman REID, (Ill.) 69 Cong. Rec., part 6, pp. 6790-6792.

5. "Flood control on the Mississippi is *not reclamation but protection* of vast areas of improved lands on which are located many towns and cities, including New Orleans, the metropolis of the south, inhabited by fully 1,500,000 people. These valley dwellers are good citizens who contribute more than their pro rata share to the Nation's wealth, and are progressive, energetic, law-abiding people, real nation builders, entitled to every consideration at the hands of their national father."

Senator RANDELL, (La.) 69 Cong. Rec., part 1, p. 938.

6. "When President Coolidge, in his message to Congress, took the position that because the land of the Mississippi Valley would be benefited by protection from floods, it must therefore bear a special assessment to pay for *such reclamation*, he revealed the fact that in spite of his unmatched opportunity for reviewing the situation as a whole

and studying it in a broad and comprehensive fashion, he is nevertheless peeping at it through a knothole. His thoughtless use of the word '*reclamation*' alone reveals a woeful failure to grasp the essentials of the problem, a failure that could hardly have persisted had he once visited the flooded area. \* \* \*

"To think of reclamation is to think of barren lands or swamps that may some day be made productive. That section which Mr. Coolidge speaks of is already producing farm and factory products worth half a billion dollars annually. *Such a section does not need reclamation.* It needs protection."

Editorial, Baltimore Manufacturers Record, put into the record by Senator RANSDELL, 69 Cong. Rec., Part 1, p. 774.

7. "With all deference to the opinion of the President of the United States, there is, to my mind, a great difference and distinction between reclamation and levees. Reclamation creates, while levees retain and protect. \* \* \*

"Levees do not reclaim lands. \* \* \* They made it possible for the development of farm lands which, in 1926, produced over \$250,000,000 of farm products. They made it possible for populous cities and thriving towns and busy factories to be found all over the Mississippi Valley."

Congressman COLLIER, (Miss.) 69 Cong. Rec., Part 2, p. 1729.

8. "I regret very much that the present President, Mr. Coolidge, did not find it in his heart to come down and see the conditions which existed a year ago in the valley. It was worth anybody's time and it seems to me that it imposed an obligation upon the Chief Executive to acquaint himself with those conditions. In my own State of Arkansas we had 16,000 square miles of territory under

water. Thousands of people were stranded in the flood where they had to be brought out by any means of transportation that could be secured. I am sure the Senator from Louisiana (Mr. RANSELL) witnessed that some of them were brought out who had been marooned in treetops, on house-tops, on railroad embankments, and other places where they could escape the flood, so long that they had become almost wild. I saw them bring out people down in *the southeast part of my State* where they had to prevent them jumping off the boat into the water as they approached land. They came out with the scantiest of wearing apparel. Everything that they had was gone. Everything that breathed in that territory, except those human beings, had been drowned. Their livestock was gone; even their chickens were gone. Their household effects were gone. While they might not have had much, it was all they had.

“There were stretches of country miles in width and miles in length in which there was not a single thing left that man had put there. Every house, every barn, every outbuilding of every nature, even the fences, were swept away... It was as desolate as this earth was when the flood subsided. So far as their little effects were concerned, it was just as destructive. Where *nearly a million people* who had paid their taxes, who had discharged every obligation to the Government that the Government imposed upon them, who had shed their blood on every battle field where American honor was at stake, I felt then and I feel now that they were and are entitled to a consideration which they did not get.”

Senator CARAWAY, (Ark.) 69. Cong. Rec., Part 8, pp. 8190-8191.

9. “It has been suggested that the works for the flood control of the Mississippi would *reclaim* the lands in the



alluvial valley. *There is no similarity between flood control and reclamation.* The very opposite obtains. The dissimilarity suggests a contrast rather than a comparison. The lands in the lower Mississippi Valley are not wild. They are improved. The area is highly developed. It is said that no lands have been cleared in the Atchafalaya Basin for 100 years. This is no reclamation scheme. *Reclamation is already an accomplished fact in the Mississippi Valley.* Practically all of the lands have been cleared and can be cultivated with profit."

Congressman WHITTINGTON, (Miss.) 69 Cong. Rec., Part 6, p. 6652.

10. Even a casual examination of the itemized statement of losses and damage caused by the flood of 1927, as prepared by the Mississippi River Flood Control Association, presented to Congress (69 Cong. Rec., Part 4, p. 4397), demonstrates that the prime purpose of the Flood Control Act of May 15, 1928, was *not reclamation*, but was for the *protection* of an intensely developed agricultural area, in which damages from the 1927 flood caused enormous losses to the Nation. Respondent's property involved in this suit lies in Desha County, of which Arkansas City, the front door of respondent's property, is the county seat. In that county alone the damages in 1927 caused by crevasses in the *Arkansas River* (not the Mississippi—R. 163) levees exceeded \$9,000,000, listed in the Congressional Record as follows:

"DESHA COUNTY

"3,000 houses destroyed.....	\$1,500,000
3,000 houses damaged .....	900,000
35 stores destroyed .....	26,250
165 stores damaged .....	82,500

5 gins damaged	5,000
5 gins destroyed	50,000
500 barns destroyed	300,000
500 barns damaged	150,000
6,000 other buildings destroyed	600,000
Damage to merchandise	75,000
Damage to baled cotton	175,000
Damage to farm implements	20,000
Damage to automobiles	45,000
Damage to feed	125,000
Damage to seed	50,000
Damage to household goods	1,800,000
3,000 horses and mules lost	300,000
2,800 cattle lost	56,000
3,500 hogs lost	35,000
350 sheep and goats lost	1,050
10,000 poultry lost	5,000
Cost of replanting	100,000
Damage to land by washing and spreading of obnoxious grasses	375,000
Loss of rents on lands not cultivated by reason of overflow	500,000
Damage to 100 miles of fence	15,000
Business losses	1,000,000
Damage to growing cotton crops	500,000
Damage to other growing crops	150,000
Damage to private roads and bridges	50,000
Damage to matured crops	20,000
Damage to school buildings and equipment	15,000
<b>Total property damage</b>	<b>\$9,025,800'</b>

Therefore the court will not likely be misled by the unfair argument that recovery must be denied respondent because forsooth her property was in times long since past the ancient and natural flood bed of the river.

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## APPENDIX C.

**WHAT IS "PROPERTY"?**

"Property, in its broadest sense, is *not the physical thing*, which may be the subject of ownership, but is the right of dominion, possession, power and disposition, which may be acquired over it; the word meaning, in its appropriate sense, that dominion, or indefinite right of use or disposition, which one may lawfully exercise over particular things or subjects, and generally *to the exclusion of all others*, and doubtless this is substantially the sense in which it is used in the Constitution.

"The right to possess, use, occupy and enjoy corporeal things and take the profits thereof is what the law regards as corporeal property."

*Transcontinental Oil Co. v. Emmerson*, 298 Ill. 394, 401, 131 N. E. 645, 16 A. L. R. 507.

"Property in a legal sense consists in the *domination* which is rightfully and lawfully obtained *over a material thing*, with the right of use, enjoyment and disposition. In the full sense, it denotes a right in point of user, *unrestricted* in point of disposition and *unlimited* in point of duration over a determinate thing."

*Shedd v. Patterson*, 312 Ill. 371, at p. 374, 144 N. E. 5.

"It (property) is *not the material object*, but the right and interest which one has in it, *to the exclusion of others*, which constitutes property. Property, in a legal sense, consists in the domination which is rightfully and lawfully obtained over a material thing, with the right to its use, enjoyment, and disposition.

"The word is often used to indicate the subject of the property or the things owned, as a chattel or a tract

of land. These things, however, though subjects of property, are, when coupled with possession, but *the visible manifestations of invisible rights*, the evidence of things not seen."

*Tatum Bros., etc., Co. v. Watson*, 92 Fla. 278, 289, 109 So. 623, 626.

"Property, in the constitutional sense, consists not in the thing said to be owned, but in the right of dominion over it, control of its use and disposition. The thing owned may be tangible or intangible, a fee in land or an *easement in it*."

*C. B. & Q. R. Co. v. Public Utilities Com.*, 69 Col. 275, 279, 193 Pac. 726, 728.

"Property means one's *exclusive* right of possessing, enjoying and disposing of a thing."

*In re Crook*, 219 Fed. 979, 985.

"Property may therefore justly be defined as the dominion, or indefinite right of user or disposition, which one may exercise over particular things or subjects. This is its appropriate *meaning, and that which it has in the Constitution*, although it is not infrequently used to indicate the thing, rather than the right, and *much of the uncertainty and confusion observable in the decisions have arisen from overlooking this distinction*."

*Watson v. Wolf*, 162 Pa. ~~153~~, at p. 169, 29 Atl. 646, 652.

"Of what does property practically consist, but of the incidents which the law has recognized as attached to the title, or right of property? Is not the idea of property in, or title to lands, apart from, and stripped of all its incidents, a purely *metaphysical abstraction*, as immaterial and useless to the owner as 'the stuff that



dreams are made of?' Is it not a much less injury to him, if it can injure him at all, to deprive him of this abstraction, than of the incidents of property, which alone render it practically valuable to him? And among the *incidents of property* in land, or anything else, is not the right to enjoy its beneficial use, and so far to *control* it as to *exclude others from that use*, the *most* beneficial, the one most real and practicable idea of property, of which it is a much greater wrong to deprive a man, than of the mere abstract idea of property without incidents? This use, or the right to control it with reference to its use, constitutes, in fact, all that is beneficial in ownership except the right to dispose of it; and this latter right or incident would be rendered barren and worthless stripped of the right to the use. Property does not consist merely of the right to the ultimate particles of matter of which it may be composed, of which we know nothing, but of those properties of matter which can be rendered manifest to our senses, and made to contribute to our wants or our enjoyments."

*Grand Rapids Booming Company v. Jarvis*, 30 Mich. 308, at pp. 320-321.

"The owners of lots abutting upon a public street have the right to access and the right of quiet enjoyment and *such rights are property* \* \* \*; that is, they have an interest in the street not common to all the people of the State, but personal and peculiar to themselves. *Their property is affected in its commercial value* and in the possibility and advantages of its use by the character of the streets upon which it abuts. \* \* \* Even partially sentimental objections, such as noise of electric cars or the

unsightliness of elevated structures, largely make up *the actual elements of market value.*"

*Holst v. Savannah Elec. Co.*, 131 Fed. 931, 942-943.

"The term 'property' as used in the Constitution is not confined to tangible objects which can be passed from hand to hand, but includes those rights of possession, disposal, management, and of contracting with reference thereto, which renders property useful, valuable and a source of happiness, the right to the pursuit of which is preserved. (Cases cited.)"

*State v. Kreutzberg*, 114 Wis. 530, 534, 90 N. W. 1098, 1100.

"In declaring that private property shall not be taken without recompense, that instrument secures to owners, *not only possession of property, but all those rights which render possession valuable. Whether you flood the farmer's fields so that they cannot be cultivated, or pollute the bleacher's stream so that his fabrics are stained, or fill one's dwelling with smells and noise so that it cannot be occupied in comfort, you equally take away the owner's property.* In neither instance has the owner any less of material things than he had before, but in each case the utility of his property has been impaired by a direct invasion of the bounds of his private dominion. This is the taking of his property in a constitutional sense."

*Pennsylvania R. R. Co. v. Angel*, 41 N. J. E. 316, 329, 7 Atl. 432.

"Property is a thing over which a man may have *dominion and power to do with it as he pleases, as long as he does not violate the law.*"

*Smith v. Campbell*, 10 N. C. 590, 597.

"There may be a 'taking' of property *without an actual physical invasion of the property.*"

*City of Big Rapids v. Big Rapids Co.*, (Mich.), 177 N. W. 284.

"The term 'property' has a most extensive signification, and in its strict legal sense means that dominion or indefinite right of user and disposition which one may lawfully exercise over particular things or objects. But the word is often used to indicate the subject of the property or the thing owned, as a chattel or a tract of land. *These things, however, though the subjects of property, are, when coupled with possession, but the indicia, the visible manifestations, of invisible rights, the evidence of things not seen.* Much of the uncertainty and confusion observable in the decisions have arisen from overlooking this distinction, \* \* \*.

"The term may mean the sum total of man's wealth, but when an injury to property is spoken of *a diminution of the value of a specific object is meant.*" \* \* \*

"Property in a determinate object as heretofore defined is composed of certain constituent elements, to-wit, the *unrestricted* right of use, enjoyment, and disposal of that object. Indeed the right of user is the most essential and beneficial quality or attribute of property. Without it all other elements which go to make up property would be of no effect. If one is deprived of the use of his property it leaves in his hands nothing but a barren title. \* \* \* *This right of user necessarily includes the right and power of excluding others from using the object.* Property in a given thing may be absolute or it may be limited and qualified. It is absolute when a thing is objectively and lawfully appropriated by one to his own

use in exclusion of all others, and which he can by no contingency be deprived of without his consent. It is limited or qualified when the control acquired falls short of the absolute."

22 R. C. L., pp. 37-39, secs. 2 and 3; with numerous cases cited in footnotes.

"The term 'property' is, in law, a generic term of extensive application. It is a term of large import, of broad and exceedingly complex meaning, of the broadest and most extensive signification, a very comprehensive word, and is the *most comprehensive of all terms which can be used*. The term is often called 'nomen generalissimum,' and is employed to signify *any valuable right* or interest protected by law, \* \* \* Although it has been stated that 'the accurate delimitation of the concept property would afford a theme especially apposite of amplificative philosophic disquisition,' (*Gleason v. Thaw*, 236 U. S. 558, 35 S. Ct. 287, 59 L. ed. 717, 719) there is also authority that dictionaries, as well as courts, have given the term 'property' a well established and definite meaning. *Property is a creation of law, an institution of law, and in all its forms is a creature of the law.*"

50 C. J., p. 729, sec. 2; and numerous cases cited in the notes.

"'Private property' is that which belongs exclusively to an individual; it is a *monopoly in nature and purpose*. The term applies to all kinds of private property; it necessarily includes everything that can be held or owned by private persons, and it is *not limited to a tangible subject-matter or corpus*, but includes the right of user and enjoyment thereof. In fact it has been stated that

'by private property is meant the right of absolute control of property,' and the term includes the right of contract in matters concerning that property."

50 C. J., p. 745, sec. 17.

It is therefore perfectly clear that counsel for petitioner are discussing issues entirely beside the point when they urge that there has not yet been any "physical invasion," and respondent has not yet been actually drowned by flood waters from the Mississippi River diverted by the Flood Control Act over her land in the Boeuf Basin floodway. They ignore the vital fact that the very fixing and dedication of this floodway by the Government under the terms of the Flood Control Act has invaded certain constituent elements of the respondent's *property*, viz, her UNRESTRICTED right of use, enjoyment and disposal, *to the exclusion of petitioner* and everyone else. Anything which destroys or subverts any of the essential elements of property hereinbefore mentioned is a "TAKING," or destruction *pro tanto* of respondent's *property*, though the possession and power of disposal of the land (at its diminished value) remain undisturbed, and "*though there be no actual or physical invasion of the locus in quo.*"

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## APPENDIX D.

**What constitutes "a TAKING" for which just compensation is required by the Fifth Amendment?**

The historical evolution and development of the legal concept of what constitutes "*a taking*" of property in the constitutional sense will not be fully appreciated, and possibly will not be correctly applied to the facts in the present case, until the *principles* reviewed in the judicial decisions have been studied chronologically, as has been suggested in the main brief, Point V, B, 4, c. No prior decision has ever involved *facts* equiparant to those now before the court, unless it be the case of *Hurley v. Kincaid*, *infra*. No decision prior to the Flood Control Act of May 15, 1928, can determine this case. That Act changed former judicial rules by legislative edict, the authoritative decree *now* controlling this court.

However, in addition to the quotations found in the main brief on this point, the following excerpts from the cases cited do reflect legal principles applicable to the facts in the instant case, and upon which respondent relies.

In *Pumpelly v. Green Bay & Miss. River Canal Co.*, 13 Wall. 177, 20 L. ed. 557, we find a statement of the fundamental principles on which liability rests stated in the opinion as follows:

"The argument of the defendant is that there is no taking of the land within the meaning of the constitutional provision, and that the damage is a *consequential* result of such use of a navigable stream as the Government had a right to for the improvement of its navigation.

"It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the Government, and which has received the commendation of jurists, statesmen and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the Government refrains from the absolute conversion of real property to the uses of the public it can *destroy its value* entirely, can inflict irreparable and permanent injury to *any extent*, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not taken for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the Government, and *make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors.*" • • •

"In the case of *Gardner v. Newburgh*, 2 Johns, Ch. 162, Chancellor Kent granted an injunction to prevent the trustees of Newburgh from diverting the water of a certain stream flowing over plaintiff's land from its usual course, because the Act of the Legislature which authorized it, had made no provision for compensating the plaintiff for the injury thus done to his land. And he did this though there was no provision in the Constitution of New York such as we have mentioned, and though he recognized that the water was taken for a public use. After citing several continental jurists on this right of eminent

domain, he says that while they admit that private property may be taken for public uses when public necessity or utility requires, they all lay it down as a clear principle of natural equity that the individual whose property is thus sacrificed must be indemnified. And he adds that the principles and practice of the English Government are equally explicit on this point. It will be seen in this case that it was the diversion of the water from the plaintiff's land, which was considered as taking private property for public use, but which, *under the argument of the defendant's counsel, would, like overflowing the land, be called only a consequential injury.*

"If these be correct statements of the limitations upon the exercise of the right of eminent domain, as the doctrine was understood before it had the benefit of constitutional sanction, by the construction now sought to be placed upon the Constitution it would become an instrument of oppression rather than protection to individual rights.

*"But there are numerous authorities to sustain the doctrine that a serious interruption to the common and necessary use of property may be, in the language of Mr. Angell, in his work on water-courses, equivalent to the taking of it, and that UNDER THE CONSTITUTIONAL PROVISIONS IT IS NOT NECESSARY THAT THE LAND SHOULD BE ABSOLUTELY TAKEN."* (Cases cited.) *Pumpelly v. Green Bay & Miss. R. C. Co., supra.*

In *United States v. Great Falls Mfg. Co.*, 112 U. S. 645; 5 S. Ct. 306, 28 L. ed. 846, the opinion calls attention to the fact that in this case "the land and water rights and privileges in question have been for nearly twenty years held

and used by officers and agents of the Government, without any compensation whatever having been made therefor to the claimant." (Yet no plea of limitation seems to have been involved.) The court then holds:

*"We are of opinion that the United States, having by its agents, proceeding under the authority of an Act of Congress, taken the property of the claimant for public use, is under an obligation, imposed by the Constitution, to make compensation. The law will imply a promise to make the required compensation, where property, to which the Government asserts no title, is taken pursuant to an Act of Congress, as private property to be applied for public uses. Such an implication being consistent with the constitutional duty of the Government as well as with common justice, the claimant's cause of action is one that arises out of implied contract, within the meaning of the statute which confers jurisdiction upon the Court of Claims, of actions founded upon any contract, express or implied, with the Government of the United States." \* \* \**

"In the same case (*Langford v. U. S.*, 101 U. S. 341, 25 L. ed. 1010) it was said: 'We are not prepared to deny that when the Government of the United States, by such formal proceedings as are necessary to bind it, takes for public use, as for an arsenal, custom-house or fort, land to which it asserts no title, but admits the ownership to be private or individual, there arises an implied obligation to pay the owner its just value. It is to be regretted that Congress has made no provision by any general law for ascertaining and paying this just compensation. And we are not called on to decide that when the Government, acting by the forms which are sufficient

to bind it, recognizes the fact that it is taking private property for public use, the compensation may not be recovered in the Court of Claims. On this point we decide nothing.'

*"The question thus reserved from decision is substantially the one now presented. . . ."*

*"In such a case, it is difficult to perceive why the legal obligation of the United States to pay for what was thus taken pursuant to an Act of Congress, is not quite as strong as it would have been had formal proceedings for condemnation been resorted to for that purpose. If the claimant makes no objection to the particular mode in which the property has been taken, but substantially waives it, by asserting, as is done in the petition in this case, that the Government took the property for the public uses designated, we do not perceive that the court is under any duty to make the objection in order to relieve the United States from the obligation to make just compensation." United States v. Great Falls Mfg. Co., supra.*

In *Great Falls Mfg. Co. v. Garland, Attorney General*, 124 U. S. 581, 8 S. Ct. 631, 31 L. ed. 527, the general principle is stated:

*"The Government is under a constitutional obligation to make compensation for any property or right taken, used and held for the purposes indicated in such Act of Congress, whether it is embraced or described in said survey or map, or not."*

This is supported by the following quotations from the opinion:

*"But even if it be true that some part of the land actually occupied by the Government is not within the survey and map, still the United States are under an*



obligation imposed by the Constitution to make just compensation for all that has been in fact taken and is retained for the proposed dam." \* \* \* and, consequently, the Government is under a constitutional obligation to make compensation for any property or *property rights* taken, used, and held by him for the purposes indicated in the Act of Congress, whether it is embraced or described in said survey or map, or not,

"Even if the secretary's survey and map, and the publication of the Attorney General's notice, did not, in strict law, justify the former in taking possession of the land and water rights in question, it was competent for the Company to *wave the tort*, and *proceed against the United States, as upon an implied contract*, it appearing, as it does here, that the Government recognizes and retains the possession taken in its behalf for the public purposes indicated in the Act under which its officers have proceeded.

"\* \* \* *there is no obstacle in the way of the plaintiff's securing by means of its suit in the court of claims, and without unreasonable delay, just compensation for all of its property taken for the public use indicated in the Act of Congress.*" *Great Falls Mfg. Co. v. Garland, supra.*

In *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 13 S. Ct. 622, 37 L. ed. 463, it is held that THE QUESTION OF COMPENSATION IS JUDICIAL. We quote the following from the opinion:

"Obviously, this question, as all others which run along the line of the extent of the protection the individual has under the Constitution against the demands of the Government, is of importance; for in any society the

*fullness and sufficiency of the securities which surround the individual in the use and enjoyment of his property constitute one of the most certain tests of the character and value of the Government.* The first ten amendments to the Constitution, adopted as they were soon after the adoption of the Constitution, are in the nature of a bill of rights, and were adopted in order to quiet the apprehension of many, that without some such declaration of rights the Government would assume, and might be held to possess, the power to trespass upon those rights of persons and property which by the Declaration of Independence were affirmed to be unalienable rights.

“In the case of *Sinnickson v. Johnson*, 17 N. J. L. 129, 145, cited in the case of *Pumpelly v. Green Bay & M. Canal Co.*, 13 Wall. 166, 178 (20 L. ed. 557, 560), it was said that ‘this power to take private property reaches back of all constitutional provisions; and it seems to have been considered a settled principle of universal law that *the right to compensation is an incident to the exercise of that power*: that the one is so inseparably connected with the other, that they may be said to exist not as separate and distinct principles, but as parts of one and the same principles.’ And in *Gardner v. Newburgh*, 2 Johns, Ch. 162, Chancellor Kent affirmed substantially the same doctrine. And in this there is a natural equity which commends it to every one. It in no wise detracts from the power of the public to take whatever may be necessary for its uses; while, *on the other hand*, it prevents the public from loading upon one individual more than his just share of the burdens of Government, and says that when he surrenders to the public something more and different from that which is exacted from other

*members of the public, a full and just equivalent shall be returned to him. . . .*

“And with respect to constitutional provisions of this nature it was well said by Mr. Justice Bradley, speaking for the court, in *Boyd v. United States*, 116 U. S. 616, 635 (29 L. ed. 746, 752): ‘Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that *constitutional provisions for the security of person and property should be liberally construed*. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the rights, as if it consisted more in sound than in substance. *It is the duty of the courts to be watchful for the constitutional rights of the citizen*, and against any stealthy encroachments thereon. Their motto should be *obsta principiis*. . . .’

“By this legislation Congress seems to have assumed the right to determine what shall be the measure of compensation. *But this is a judicial, and not a legislative question*. The legislature may determine what private property is needed for public purposes—that is a question of a political and legislative character; but when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public taking the property, through Congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that *just compensation shall be paid*, and the ascertainment of that is a judicial inquiry. . . .

‘They, (the legislature) provide that the new company shall

pay annually to the college in behalf of the old one a hundred pounds. By this provision it appears that the legislature has undertaken to do what a jury of the country only could constitutionally do: assess the amount of compensation to which the complainants are entitled.' See also the following authorities: *Com. v. Pittsburgh & C. R. Co.*, 58 Pa. 26, 50; *Pennsylvania R. Co. v. Baltimore & O. R. Co.*, 60 Md. 263; *Isom v. Mississippi Cent. R. Co.*, 36 Miss. 300.

"In the last of these cases and on page 315, will be found these observations of the court: 'The right of the legislature of the State, by law, to apply the property of the citizen to the public use, and then to constitute itself the judge in its own case to determine what is the 'just compensation' it ought to pay therefor, or how much benefit it has conferred upon the citizen by thus taking his property without his consent, or to extinguish any part of such 'compensation' by prospective conjectural advantage, or in any manner to interfere with the just powers and province of courts and juries in administering right and justice, cannot for a moment be admitted or tolerated under our Constitution. If anything can be clear and undeniable upon principles of natural justice or constitutional law, it seems that this must be so.' \* \* \*

"\* \* \* *The value of property generally speaking, is determined by its productiveness—the profits which its use brings to the owner. Various elements enter into this matter of value. Among them we may notice these: Natural richness of the soil as between two neighboring tracts—one may be fertile, and the other barren; the one so situated as to be susceptible of easy use, the other requiring much labor and large expense to make its fertility avail-*

able. *Neighborhood to the centers of business and population largely affects values.* For that property which is near the center of a large city may command high rent, while property of the same character, remote therefrom, is wanted by but few. \* \* \*

*"So before this property can be taken away from its owners the whole value must be paid. \* \* \**

*"But like the other powers granted to Congress by the Constitution, the power to regulate commerce is subject to all the limitations imposed by such instrument, and among them is that of the 5th Amendment, we have heretofore quoted. Congress has supreme control over the regulation of commerce, but if in exercising that supreme control, it deems it necessary to take private property, then it must proceed subject to the limitations imposed by this 5th Amendment, and can take only on payment of just compensation. The power to regulate commerce is not given in any broader terms than that to establish post offices and post roads; but if Congress wishes to take private property upon which to build a post office, it must either agree upon the price with the owner, or in condemnation pay just compensation therefor. \* \* \* Whatever be the true value of that which it takes from the individual owner, must be paid to him before it can be said that just compensation for the property has been made. \* \* \**

*"\* \* \* It would seem strange that, if by asserting its rights to take the property, the Government could strip it largely of its value, destroying all that value which comes from the receipt of tolls. \* \* \**

*"\* \* \* and the question of just compensation is not determined by the value to the Government which takes, but the value to the individual from whom the property is*



taken." *Monongahela Navigation Co. v. United States, supra.*

*United States v. Lynch*, 188 U. S. 445, 23 S. Ct. 349, 47 L. ed. 539, is often cited as the leading case on Government liability for property damaged or taken for public use. We quote the following syllabi:

"A circuit court of the United States has jurisdiction of a suit against the United States to recover compensation for the alleged total destruction of the value of real property as a necessary result of the acts of its officers and agents in improving navigation, where the Government does not deny plaintiff's title, and admits that the work done was authorized by Congress, but denies that such work produced the alleged injury and destruction.

"The liability of the United States under the 5th Amendment to the Federal Constitution, to make just compensation for an appropriation of land for public use, is not defeated because such land was taken by the Government in the exercise of its power to improve navigation."

The entire opinion rewards careful study. The following extracts might refer to the case at bar:

"It seems clear that these property rights have been held and used by the agents of the United States, under the sanction of legislative enactments by Congress; \* \* \* *The making of the improvements necessarily involves the taking of the property; \* \* \**

"\* \* \* we are of the opinion that the United States, having by its agents, proceeding under the authority of an act of Congress, taken the property of the claimant for public use, are under an obligation, imposed by the Constitution, to make compensation. *The law will imply a promise to make the required compensation, where prop-*

erty, to which the Government asserts no title, is taken, pursuant to an act of Congress, as private property to be applied for public uses.

"Such an implication being consistent with the constitutional duty of the Government, as well as with common justice, the claimant's cause of action is one that arises out of *implied contract*, within the meaning of the statute which confers jurisdiction upon the Court of Claims of actions founded 'upon any contract, express or implied, with the Government of the United States.' " \* \* \*

"Whenever in the exercise of its Governmental rights it takes property the ownership of which it concedes to be in an individual, it impliedly promises to pay therefor. Such is the import of the cases cited as well as of many others. \* \* \*

"This brings the case directly within the scope of the decision in *United States v. Great Falls Mfg. Co.*, 112 U. S. 645, 28 L. ed. 846, 5 Sup. Ct. Rep. 306, where, as here, there was no direction to take the particular property, but a *direction to do that which resulted in a taking*, and it was held that the owner might waive the right to insist on condemnation proceedings, and sue to recover the value. \* \* \*

"*Was there a taking?* There was no proceeding in condemnation instituted by the Government, no attempt in terms to take and appropriate the title. There was no adjudication that the fee had passed from the land owner to the Government, and if either of these be an essential element in the taking of lands, within the scope of the 5th Amendment, there was no taking. \* \* \*

"It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and se-

curity to the rights of the individual as against the Government, and which has received the commendation of jurists, statesmen, and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the Government refrains from the absolute conversion of real property to the uses of the public, it can destroy its *value* entirely, *can inflict irreparable and permanent injury to any extent*; can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not taken for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the Government, and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors." \* \* \*

"It is clear from these authorities that where the Government by the construction of a dam or other public works so floods lands belonging to an individual as to substantially destroy their value there is a taking within the scope of the 5th Amendment. While the Government does not directly proceed to appropriate the title, yet it takes away the use and value; when that is done it is of little consequence in whom the fee may be vested." \* \* \*

"But if any one proposition can be considered as settled by the decisions of this court it is that, although in the discharge of its duties the Government may appropriate property, it cannot do so without being liable to the obligation cast by the 5th Amendment of paying just compensation.

"But like the other powers granted to Congress by the Constitution, the power to regulate commerce is subject to all the limitations imposed by such instrument, and among them is that of the 5th Amendment we have heretofore quoted. Congress has supreme control over the regulation of commerce, but if in exercising that supreme control it deems it necessary to take private property, then it must proceed subject to the limitations imposed by this, 5th Amendment, and can take only on payment of just compensation."

"\* \* \* Here there is no finding, no suggestion, that by any expense the flooding could be averted." *United States v. Lynah, supra.*

So is it in the case at bar.

*Easements.* In *United States v. Welch*, 217 U. S. 333, 30 S. Ct. 527, 54 L. ed. 787, the court held:

"The owner of a farm, a part of which is permanently flooded by a Government dam, must be compensated, in addition to the value of the land taken, for the lessened value of the farm, caused by the consequent cutting off of a private way across the lands of others, which is the only practicable outlet from the farm to the county road." 54 L. ed. 787.

In *United States v. Grizzard*, 219 U. S. 180, 31 S. Ct. 162, 55 L. ed. 165, the court said:

"Whenever there has been an actual physical taking of a part of a distinct tract of land, the compensation to be awarded includes not only the market value of that part of the tract appropriated, but the damage to the remainder resulting from that taking, embracing, of course, injury

due to the use to which the part appropriated is to be devoted." 55 L. ed. at p. 166.

In the *United States v. North American Transp. & Trading Co.*, 253 U. S. 330, 40 S. Ct. 518, 64 L. ed. 935, the Court restates the now well established principle in the following sentence:

"When the Government, without instituting condemnation proceedings, appropriates for a public use, under legislative authority, private property to which it asserts no title, it impliedly promises to pay therefor (cases cited)." 64 L. ed. 937.

In *Campbell v. United States*, 266 U. S. 368, 45 S. Ct. 115, 69 L. ed. 328, the Court uses the following language which is applicable to the case at bar:

"The taking was under the sovereign power of eminent domain. The President and Secretary of War were authorized to purchase or condemn the lands. . . . And from the taking there arose an implied promise by the United States to compensate plaintiff for his loss. (Cases cited.) Thereupon he became entitled to have the just compensation safeguarded by the 5th Amendment to the Constitution; that is, *the value of the land taken and the damages inflicted by the taking*,—such a sum as would put him in as good a position pecuniarily as he would have been if his property had not been taken." 69 L. ed. 330.

In *Pennsylvania Coal Company v. Mahon*, 260 U. S. 393, 43 S. Ct. 158, 67 L. ed. 322, the Court held that a statute forbidding the mining of coal under private dwellings or streets or cities in places where the right to mine such coal is reserved in the grant is unconstitutional, as *taking prop-*



erty without due process of law. In the opinion the Court says:

"As said in a Pennsylvania case: 'For practical purposes, the right to coal consists in the right to mine it.' (Case cited.) What makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it. \* \* \*

"The general rule, at least, is that while property may be regulated to a certain extent, *if regulation goes too far it will be recognized as a taking*. We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the *constitutional way of paying for the change*." 67 L. ed., pp. 325, 326.

In *Duckett & Company v. United States*, 266 U. S. 149, 45 S. Ct. 38, 69 L. ed. 216, the Supreme Court recognizes, and stated, the very practical fact, so distressingly real to respondent in the case at bar, that: "*A right may be taken by simple destruction for public use*." 69 L. ed. 219.

In *Curtin v. Benson*, 222 U. S. 78, 32 S. Ct. 31, 56 L. ed. 102, the court held that the Secretary of the Interior cannot make the exercise by an owner and lessee of lands within the Yosemite National Park, of his right to pasture his cattle upon such lands, and to use the toll roads leading thereto, conditional upon his compliance with certain rules and regulations prescribed by the Secretary for the Government of the park, as to marking and defining the boundaries, or obtaining the written permission of the superintendent. Because, as stated by the court in its opinion:

“On the merits of the case we may concede, *arguendo*, as contended by the appellees and disputed by appellant, that the United States may exercise over the park not only rights of a proprietor, but the powers of a sovereign. There are limitations, however, upon both. *Neither can be exercised to destroy essential uses of private property.* The right of appellant to pasture his cattle upon his land, and the right of access to it, are of the very essence of his proprietorship. . . . His (Benson’s) order is not, it will be observed, a regulation of the use of the land, as an order to fence the lands might be, but is an absolute prohibition of use. It is not a prevention of a misuse or illegal use, but the prevention of a legal and essential use—an attribute of its ownership—one which goes to make up its essence and value. To take it away is practically to take his property away.” 56 L. ed., pp. 105-106.

“Where the Government occupies land by the overflow of water with no claim of title or right, it is the exercise of the right of eminent domain, from which an implied contract arises.

“In the civil economy of political society *whatever is legal is right*; the power of eminent domain is legal, and is therefore right; being right in legal contemplation it excludes from the transaction to which it is properly applied all wrong, and therefore all tort.

“The taking of private property without the consent of the owner on the part of an individual is a wrong *per se*; but not necessarily so upon the part of the Government, as it has the constitutional right to take private property against the will of the owner, *subject to the condition of paying for it*. Individuals hold their property subject to the wants and necessities of the public, and if in the exercise

of the right of eminent domain the public appropriate such property, a *compensation* in value is the only redress due the owner." . . .

*"The owner may waive any objection he might be entitled to make based upon the want of such formal proceedings (formal condemnation), and, electing to regard the action of the Government as a taking under its sovereign right of eminent domain may demand just compensation for the property."*

*Merriam v. United States*, 29 Ct. Cls. 250, 258-259.

Where a county road was overflowed from backwater caused by a Government built dam, the court held the United States liable for the taking of "*private property* within the meaning of the Fifth Amendment to the Constitution," saying:

"The fee of the road taken is assumed to have been in the abutting property owner in accordance with the general rule in the State of Kentucky. The county's property was an easement which it held in trust for the benefit of the public.

"While such property is within most of the definitions of *public* and not *private* property, we are of the opinion that for purposes of *compensation* as for a taking under the Constitution it is properly to be regarded as private property and upon that theory we have awarded judgment."

*Wayne County, Kentucky v. The United States*, 53 Ct. Cls. 417; affirmed 252 U. S. 574, 40 S. Ct. 394, 64 L. ed. 723.

"Where land is appropriated to a public use, either with the consent of the owner or otherwise, a common law action will lie to recover the just compensation to which the owner is entitled. These cases proceed upon the

ground of an *implied promise* to pay the just compensation to which the owner is entitled; \* \* \*. The *measure of damages would be the same as in a condemnation proceeding.*"

*Lewis, Eminent Domain*, (3rd ed.) Sec. 889, p. 1545; and numerous cases there cited.

"It may be laid down as a well-settled principle that every proprietor over or past whose land a stream of water flows has a right that it shall continue to flow to and from his premises in the *quantity, quality and manner in which it is accustomed to flow by nature*, subject to the right of the upper proprietors to make a reasonable use of the stream as it flows past their land. This right is a part of his *property* in the land and in many cases constitutes its most valuable element. It necessarily follows therefore, that *any violation of this right in the exercise of the power of eminent domain, is a taking of private property for which compensation must be made.*"

*Lewis, Eminent Domain*, (3rd ed.) Sec. 71, p. 69; and numerous cases there cited.

"Where the waters of a stream or any part thereof are taken or *diverted* \* \* \* *to make a new channel* either for the improvement of navigation or for the protection of a public road, or *for any other public use*, compensation must be made to the inferior proprietors on the stream who are injured thereby."

*Lewis, Eminent Domain*, (3rd ed.) Sec. 74, pp. 73-76; and cases there cited.

"Not only is it a violation of the right of a riparian owner to obstruct or divert the water of a stream before it reaches his land, but it is *equally a violation of his*

*rights to increase the quantity of water flowing past his land by artificial means not connected with the reasonable use of the land above."*

*Lewis, Eminent Domain, (3rd ed.) Sec. 75, p. 78.*

*"Works of public utility must be so constructed as not to interfere with the accustomed flow of the stream, otherwise there is a right to recover for a consequent damage to private property."*

*Lewis, Eminent Domain, (3rd ed.) Sec. 78, p. 86; and cases cited.*

*"If no part of one's land is taken, he may always recover for damages occasioned by such interference with current of the stream, \* \* \* by a common law action. \* \* \**

*"Changing the channel or direction of the current, so that the stream is cast upon the lower proprietor in a different place, or so that the current strikes his land from a different direction, to his injury, is a taking or actionable injury."*

*Lewis, Eminent Domain, (3rd ed.) Sec. 78, pp. 87-88; and cases cited.*

*"The public right is a right of passage only, including the right to improve the navigation. It is necessarily limited to the bed of the stream. So far as the water is concerned, it can only use it for navigation; it cannot take it or divert it."*

*Lewis, Eminent Domain, (3rd ed.) Sec. 85, p. 100; and cases cited.*

*"\* \* \* any damage to riparian owners on public streams by works for any purpose not connected with the*



improvement of navigation is *a taking for which compensation is to be made.*"

*Lewis, Eminent Domain*, (3rd ed.) Sec. 88, p. 107; and cases cited.

"Generally, it is *a taking* to collect surface water into a channel and turn it in a body upon the land of another, *whether the water would have found its way there by nature or not.*"

*Lewis, Eminent Domain*, (3rd ed.) Sec. 112, p. 154; and long list of cases there cited.

"*Flooding Land or Interfering With Drainage.* Where land is flooded, or *its drainage prevented*, by the obstruction of the flow of water, or *its diversion from its natural channel*, there is, in general, such *a taking* or injury as entitles the owner to compensation, although the improvement causing the injury was authorized by the legislature."

20 *Corpus Juris*, p. 684, Sec. 147; and numerous cases there cited.

"Property need not be taken in the literal sense in order to entitle the owner to compensation as for property taken, and, *in fact the right acquired is ordinarily a mere easement.* The owner has the same amount of land as before, but the *easement acquired* for the public use is a material and permanent interruption in the use of the land which is the taking of property. Property in land is right of user and disposition and dominion *to the exclusion of all others*, and that is the sense in which it is used in the Constitution."

"In some cases, such as railroad right-of-way, the *right acquired* by the petitioner is practically exclusive,

and the naked title which is left in the owner is for all practical purposes of no value. In such cases the damages must be assessed at the *full market value* of the land. *In any case* the owner is entitled to be paid for such rights of use and enjoyment of his land as are taken from him . . . .”

*Drainage Commissioners v. Knox*, 237 Ill. 148, 86 N. E. 636, 637.

“It (property) comprehends not only the thing possessed but the right also to use and enjoy it and every part of it, and in case of real estate to the full limits of the boundary thereof. \* \* \* Upon principle, therefore, as well as upon authority, we hold that *any thing done by a State or its delegated agent, as a municipality, which substantially interferes with the beneficial use and ownership of the land, depriving the owner of his lawful dominion over it or any part of it, not within general police powers of the State as commonly understood, is a taking or damaging of the property without compensation within the meaning of the constitution and inhibited thereby.*”

*Fruth v. Board of Affairs*, 75 W. Va. 456, 84 S. E. 105, 106, L. R. A. 1915C 981.

“Property is defined to be the *unrestricted and exclusive* right to a thing; the right to dispose of the substance of a thing in every legal way; to use and exclude everyone also from interfering with it. Burrows Law Dictionary. To hold that one man may lawfully for his own pleasure or convenience *make use of or in any way interfere with the property of another* without his permission, would be to introduce into the law of property a doctrine both novel and dangerous.”

*Bruch v. Carter*, 32 N. J. L. 554, 561. \* 7

*"Anything which destroys any of the elements of property, including the owner's unrestricted and unlimited right of use, enjoyment and disposal, to that extent destroys the property itself."*

*Fitzhugh v. City of Jackson*, 132 Miss. 585, 97 So. 190,  
33 A. L. R. 279.

*"Property is taken within the constitutional meaning where it is materially impaired by something more than mere consequential injury, and which impairment renders it impossible for the owner to enjoy his property to the full extent to which he is entitled."*

*Lovett v. West Virginia Central Gas Co.*, 65 W. Va. 739, 65 S. E. 196, 24 L. R. A. (N. S.) 230.

*"When and so far as the owner of land is prevented from exercising practical dominion and the right to use his land at his own free will and pleasure, it is taken."*

*Traut v. White*, 46 N. J. E. 437, 19 Atl. 196.

*"A taking or deprivation of property which is prohibited by the constitution unless due compensation is made includes anything that affects or limits the free use and enjoyment of one's property or of the easements or appurtenances thereto."*

*Myer v. Adam*, 71 N. Y. S. 707, 710.

In the *Wateree Power Co. v. Rion* (S. C.), 102 S. E. 331, the court held: *"A claim of right to use land by way of an easement is as much a taking as if the land were constantly subjected to the easement;"*  
or in the exact language of the opinion:

*"The right to use the land condemned at any time by the respondent is in contemplation of law just as much a*

taking for the purpose of easement as if actually used *all the time* by them." *Waterree Power Co. v. Rion*, (S. C.), 102 S. E. 331.

In *Mississippi & R. R. Boom Co. v. Pattetson*, 98 U. S. 403, 25 L. ed. 206, 208, the court in speaking of the various ways in which property may be taken for public use said: "The property may be appropriated by an *Act of the Legislature*. . . ."

"As the plaintiff in the case at bar was virtually deprived of the right to build upon his lot by the statute in question, and as this circumstance obviously impaired its value and interfered with his power of disposition, it was to that extent void as to him, . . ."

"Whenever a law deprives the owner of the beneficial use and free enjoyment of his property or *imposes restraints upon such use and enjoyment that materially affects its value*, without legal process or compensation, it deprives him of his property within the meaning of the Constitution. All that is beneficial in property arises from its use and the fruits of that use, and whatever deprives a person of them deprives him of all that is desirable or valuable in the title and possession. It is not necessary, in order to render a statute obnoxious to the restraints of the Constitution that it must in terms or in effect authorize an *actual physical taking* of the property or the thing itself, so long as it *affects its free use and enjoyment or the power of disposition at the will of the owner*."

*Forster v. Scott*, 136 N. Y. 577, 32 N. E. 976, 18 L. R. A.

In *St. Louis v. Hill*, 116 Mo. 527, 22 S. W. 861, 21 L. R. A. 226, an ordinance of the city of St. Louis established a certain highway as a Boulevard and forbade the erection of any building within forty feet of the North and South line of the Boulevard. Defendant, who owned land abutting upon the North side of the Boulevard was convicted of violating the ordinance by building a structure within fifteen feet of the North line of the Boulevard. It was contended that the ordinance was void, because it took his property without making compensation. The court said:

"It is urged on behalf of plaintiff that there has been no 'taking' of private property under this law and ordinance, because the 'title' to the property and the right to use the same, are still in the defendant. This contention brings into prominence the true import of the word 'property.' The general result of various definitions of the term is that it is the *exclusive* right of any person to freely use, enjoy and dispose of any determinate object, whether real or personal. (Citing cases.) Sometimes the term is applied to the thing itself, as to a horse or a tract of land. These things, however, though the subjects of property, are, when coupled with possession, but the indicia, the visible manifestations, of invisible rights, 'the evidence of things not seen.' *Property*, then, in a determinate object, is composed of certain constituent elements, to-wit, the *unrestricted* right of use, enjoyment and disposal of that object. It follows from this premise that *anything which destroys or subverts any of the essential elements aforesaid is a taking or destruction pro tanto of property*, though the possession and power of disposal of the land remain undisturbed, and though there be no ac-



*tual or physical invasion of the locus in quo.* (Citing cases.)

"The use of a given object is the most essential and beneficial quality or attribute of property. Without it all other elements which go to make up property would be of no effect. If the city were allowed to deprive the defendant of the use of his entire lot, it would leave in his hands but a barren and Barmecidal title; and what is true of property rights as an integer is true of each fractional portion. If plaintiff's theory be correct, then the city could pass and enforce an ordinance which would deprive defendant of the use of his entire lot, and still there would be no 'taking' within the terms of Section 21, Art. 2 of the Constitution, and consequently no right to compensation. The statement of such a position is sufficient to accomplish its utter repudiation.

*"The day before the ordinance went into operation defendant had the unquestionable right to build at will on his lot. The day afterwards he was as effectually prevented from building on the forty-foot strip, except under peril of punishment, as if the city had built a wall around it, and this too, without any form of notice, any species of judicial inquiry, or any tender of compensation. If this is not a 'taking' by mere arbitrary edict, it is difficult to express in words the meaning which should characterize the act of the city."*

Just as effectively does the Flood Control Act make it impracticable to build a costly home or make any valuable permanent improvements on lands forming the floor of the Boeuf Basin floodway. It has rendered such lands unfit as a place to live or farm.

In *Philadelphia Company v. Stimson*, 223 U. S. 605, 32 S. Ct. 340, 56 L. ed. 570, the controversy was over the establishment by defendant, Secretary of War, under authority of Congress, of certain harbor lines in the Ohio River claimed to encroach upon an island therein, owned by plaintiff, and to prevent it from occupying its land outside of the prescribed limits. In drawing a distinction between the effect of merely establishing such harbor lines and enforcing them to the injury of private rights, the court said:

"It has been held that the establishment of a general system of harbor lines for the protection of commerce and navigation is not of itself an injury to property and cannot be restrained. (Citing cases.) But it has also been recognized that a different question arises when *active measures are taken against an individual proprietor to maintain a location of limits in alleged violation of his private rights and thus to prevent him from enjoying what is asserted to be the lawful use of his property.* (Case cited.)"

In *Richards v. Washington Terminal Company*, 233 U. S. 546, 34 S. Ct. 654, 58 L. ed. 1088, Congress, by two certain Acts, authorized defendant to construct a tunnel with ventilating fans at the mouth thereof in the vicinity of plaintiff's dwelling house, for the passage of railroad trains through the same. The operation of the fans, as well as the trains themselves passing through the tunnel, caused huge quantities of smoke and gas to enter plaintiff's house, settle on the furniture, contaminating the air and otherwise rendering the dwelling objectionable as a place of habitation. The Act authorized defendant to acquire by condemnation "the lands and property necessary for all

and every purpose contemplated," but the defendant never resorted to condemnation proceedings for the ascertainment of the damage done to the plaintiff. Plaintiff brought suit to recover his damages. Recovery was allowed. The court said:

"The case shows that *Congress* has *authorized*, and in effect *commanded*, defendant to construct its tunnel with a portal located in the midst of an inhabited portion of the city. The authority, no doubt, includes the use of steam locomotive engines in the tunnel, *with the inevitable concomitants* of foul gases and smoke emitted from the engines. No question is made but that *it includes the installation and operation of a fanning system* for ridding the tunnel of this source of discomfort to those operating the trains and traveling upon them. All this being granted, the special and peculiar damage to the plaintiff as a property owner in close proximity to the portal is the *necessary consequence*, unless at least it be feasible to install ventilating shafts or other devices for preventing the outpouring of gases and smoke from the entire length of the tunnel at a single point upon the surface, as at present. Construing the acts of Congress in the light of the Fifth Amendment, *they do not authorize the imposition of so direct and peculiar and substantial a burden upon plaintiff's property without compensation to him*. If the damage is not preventable by the employment at reasonable expense of devices such as have been suggested, then plaintiff's property is 'necessary for the purposes contemplated,' and may be acquired by purchase or condemnation \* \* \*, and pending its acquisition defendant is responsible. If the damage is readily preventable, the statute fur-

nishes no excuse, and defendant's responsibility follows on general principles."

Paraphrased to adapt the same principle to the facts in the case at bar, is it not obvious that the court would be required to say:

"The case shows that Congress has authorized and in effect commanded defendant to construct a floodway over these lands with the inevitable concomitants (as expressly alleged in the petition) of overwhelming them with the floodwaters of the river, sweeping away all improvements thereon, covering them with sand, stone and debris, choking up the drainage ditches thereon, killing the timber, making impossible the logging thereof, rendering the soil unfit for further profitable use, and completely destroying the market value of the land from the time it became certain that they were to be used for floodway purposes. All this being granted, this special and peculiar damage to respondent, as the owner of lands within the floodway, is the necessary consequence. Construing the Act of Congress in the light of the Fifth Amendment it does not authorize the imposition of so direct and peculiar and substantial burden upon respondent's property without compensation to her. If this damage is not preventable, then respondent's property is necessary for the purposes contemplated and may be acquired by purchase or condemnation, and pending its acquisition petitioner is responsible."

In *In re Delafield*, 109 Fed. 577, the City of Pittsburgh passed an ordinance for the condemnation and taking of petitioner's property for a filtration plant. Under the law either party could institute a condemnation proceeding.

The landowner instituted such a proceeding. The court said:

"The ordinance here declares and enacts that 'the said city does hereby elect and resolve to take, use, and appropriate the said real estate and land for the purposes aforesaid.' \* \* \* *To all intents and purposes, the ordinance amounts to an actual appropriation. It deprives the proprietor of his beneficial ownership.*"

In *Chappel v. United States*, 34 Fed. 673, the United States Light House Board, by authority of Congress and with money appropriated by Congress for that purpose, erected two light houses or range lights; one in the water in front of the shore of plaintiff's lands and the other a mile back on the land of someone else. Plaintiff's land lay between the two lights and was being held by him as a site for buildings for manufacturing purposes. In order that the lights might perform their purpose, it was essential that there should be no intervening objects between the two lights; so that vessels navigating the channel could for their guidance observe the two lights in a line with one another. The proper authorities of the government commanded plaintiff to leave a space on his land not less than sixty feet wide unobstructed by buildings. He sued for compensation because he had thereby been prevented from using that portion of his land. In overruling defendant's demurrer to the petition, the court said:

"It is not denied that the obstruction which would have resulted from the plaintiff building upon his land between the beacons would have defeated the lawful purpose of the United States, and would have endangered the safety of vessels using the channel which Congress had



directed should be deepened, and should be marked by the range beacon. These being the facts it would seem clear in requiring that the beacons should remain unobstructed and *in requiring that plaintiff should desist from building on his intervening land*, the officers of the Light House Board were doing *a lawful and authorized act* and one necessarily involved in the direction by Congress that the Board should erect and maintain the range beacons. It cannot be said, therefore, that their act was tortious. And we think it follows, that *if the plaintiff, by submitting to their lawful commands, consented to a restriction upon the free use of his property, which entailed damage or loss upon him, there is no obstacle in the jurisdiction of the court to his recovery*. In the case of *United States v. Manufacturing Company*, 112 U. S. 645, the Supreme Court distinctly held that where, pursuant to an act of Congress, private property had been taken for public use, by the officers of the Government, there is an implied obligation upon the Government to make compensation to the owner, and, although the taking be irregular and might have been enjoined, that *the claimant could waive his right to resist the officers of the Government and electing to regard their action as lawful, might sue in the Court of Claims for just compensation.*"

In *School Corporation v. Heiney*, 178 Ind. 1, 98 N. E. 628, 43 L. R. A. (N. S.) 1023, there had been deeded to the School Corporation for school purposes a certain tract of land, the deed providing that the property shall be forfeited if the use thereof for school purposes should be discontinued. This property was located 470 feet from a certain railroad right-of-way. Subsequently, the Legislature

passed a law making it unlawful to erect school buildings at any place within 500 feet of a railroad. By reason of its bad state of repair the school building on this site had been condemned by the State Board of Health, and it had become necessary to construct a new building in place thereof. The School Corporation employed an architect to prepare plans and specifications for the new school building and intended to erect the same on the old site. Plaintiff brought suit to restrain the corporation from so doing. The School Corporation contended that the Act was unconstitutional as a taking of property without due process of law and in violation of the Federal and State Constitution. The court in upholding this contention said:

"What is a 'taking' of property within the constitutional provision is not always clear; but, so far as general rules are permissible of declaration on the subject, it may be said that there is a taking where the act involves *an actual interference with, or disturbance of, property rights*, which are not merely consequential or incidental injuries to property or property rights, as distinguished from *prohibition of use or enjoyment, or destruction of interests in property*. (Citing cases.) *It seems axiomatic in that, if property may not be physically taken without just compensation under due process of law, one cannot be deprived of its use or enjoyment, for that is in effect a taking.*"

In *Glover v. Powell*, 10 N. J. E. 211, the plaintiffs, for a great number of years, had maintained under legislative authority a dam upon a creek emptying into the Delaware River for the purpose of protecting their meadow lands along the creek. Subsequently, in 1854 the Legislature ordered the dam removed and the creek opened as a public.

highway. The defendants, as the Township Committee, were directed to remove the dam by a designated day. Plaintiff brought suit to enjoin their doing so. In the course of its opinion the court said:

"The Act of 1854 is also repugnant to the Constitution of the State of New Jersey. Art. 1, No. 16, declares private property shall not be taken for public use without just compensation. And Art. 4, No. 7, par. 9, individuals or private corporations shall not be authorized to take private property for public use, without just compensation first made to the owners. The dam and water works in question are private property. They have been constructed, maintained and paid for by the owners of the meadow along the creek. They have been acquired under the express sanction of law. *The value of the meadow is destroyed by the execution of the law in question, and thus may be said, with propriety, to be taken from the owners. A partial destruction, a diminution of their value, is the taking of private property.* This act cannot be carried into effect without a violation of the Constitution of the State."

"The constitutional guaranty that no person shall be deprived of his property without the due process of law, *may be violated without the physical taking of property* for public or private use. Property may be destroyed or its value may be annihilated; it is owned and kept for some useful purpose and it has no value unless it can be used. Its capability for enjoyment and adaptability to some use are essential characteristics and attributes without which property cannot be conceived; and hence *any law which destroys it or its value, or takes away any of its essential attributes deprives the owner of his property.*"

*In re: Jacobs*, 98 N. Y. 98.

"The word 'property' in the tenth article of the Bill of Rights, which provides that 'whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor,' should have such a liberal construction as to include every valuable interest which can be enjoyed as property and recognized as such.

"Nor is it material whether the property is removed from the possession of the owner, or in any respect changes hands; if it is of such a character and so situated that the exercise of the public use of it, as warranted by the Legislature, does in its necessary natural consequences, affect the property, by taking it from the owner, or depriving him of the possession or some beneficial enjoyment of it, then it is 'appropriated' to public use by competent authority, and the owner is entitled to compensation."

*Old Colony Etc. R. Co. v. County of Plymouth, 14 Gray 155.*

"The proprietary rights which are the only valuable attributes or ingredients of a landowner's property, may be taken from him without an asportation or adverse personal occupation of that portion of the earth, which is his in the limited sense of being the subject of certain legally recognized proprietary rights, which he may exercise for a short time. Property is taken when any of those proprietary rights is taken, of which property consists."

*Thompson v. Androscoggin River Imp. Co., 54 N. H. 545.*

"Any substantial interference with private property which destroys or materially lessens its value, or by which the owner's right to its use and enjoyment is in any substantial degree abridged or destroyed is a taking, even

though the title and possession of the owner remain undisturbed, *and there is no actual, physical invasion of the property.*

"The authorities do not all agree as to just what will amount to a taking of private property, within the meaning of the provision of the Constitution of the United States, which provision, with an occasional change in the phraseology, has been incorporated into the Constitutions of the several States, namely, 'Private property shall not be taken for public use without just compensation.' Many of the *earlier cases* adopted the more restricted construction, and held that, to bring a case within the foregoing provision of the Constitution, there must be *'an actual physical appropriation of the private property sought to be converted to a public use; but, as stated in I Lewis on Eminent Domain (2d Ed.) par. 57, 'the law, as to what constitutes a taking has been undergoing radical changes in the last few years.'* And the great weight of the more judicial authority, which we believe to be supported by the better reason, and which is more in accord with our ideas of equity and natural justice, holds that *any substantial interference with private property which destroys or materially lessens its value, or by which the owner's right to its use and enjoyment is in any substantial degree abridged or destroyed, is, in fact and in law, a taking, in the constitutional sense, to the extent of the damages suffered, even though the title and possession of the owner remain undisturbed.'*" (Citing cases.)

*Stockdale v. Rio Grande W. R. Co.*, 28 Utah 201, 77 Pac. 849, 852.

In *People ex rel. M. Wineburgh Advertising Co. v. Murphy*, 113 N. Y. S. 855, the question was whether an or-



dinance restricting the height of sky signs for advertising purposes to 9 feet, could be sustained as a reasonable exercise of the police power: The realtor had sought and had been denied a permit to erect a sign upon his building in excess of 9 feet. The court said:

"It is complained that this (ordinance) imposes such limitations upon the use of real property within the City of New York as to amount to the taking of private property without compensation. *It is quite clear that the ordinance constitutes a taking of the property. It imposes restraints and limitations upon the owner's power to use his property* and it is well settled that when a law deprives the owner of the beneficial use and free enjoyment of his property or imposes restraints upon such use and enjoyment that *materially affects its value*, it deprives him of his property within the meaning of the Constitution."

"Private property may not be taken for a public use without the making of just compensation to the owner. *The taking of property under that provision of the Constitution does not always mean the actual taking by the process of obtaining the physical possession of the property.* When the use of property is interfered with to the prejudice of the owner and there is *a diminution of the value* of the use of the property, *that is a taking* within the meaning of the Constitution."

*Webster County v. Lutz*, 234 Ky. 618, 28 S. W. (2d)

966.

Any number of additional, supporting authorities could be cited; but the foregoing should suffice to portray the principles sustained by the overwhelming weight of authority in the judicial world, principles which, as they are

read, this court will instinctively apply to the facts in the present case as reflected by the allegations of respondent's petition and this record.

When the petition in the case at bar (R/ 4-16) is read in the light of the foregoing authorities, the petitioner must expect an adjudication of "taking" in the constitutional sense, as the Congress intended. . The material allegations of the petition are indubitably established by official records and uncontradicted testimony. The admitted facts impel the judicial mind to the irresistible conclusion of petitioner's liability. There is no logical escape. Every requirement of natural justice, common sense and judicial reasoning conspires to render judgment here for respondent.

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## APPENDIX E.

**WHEN was the property "taken"?**

In *United States v. Yazoo & M. Ry. Co.*, 4 Fed. Supp. 366, a case parallel and in all respects in point with the present case, being a construction of the Flood Control Act of May 15, 1928, with reference to the Bonnet Carre floodway, the court correctly said:

"For all practical purposes the spillway is, and has been since June, 1931, complete and ready for operation whenever the need therefor shall arise. *The United States has acquired and taken every right needed for the spillway project, and the property of the respondent has to all intents and purposes been subjected to every possible use contemplated by the taking.*

"The facts show a taking within the principles of law applicable and give rise to compensation in favor of the respondent." 4 Fed. Supp. 366.

"Where a statute provides that certain lands described therein or so much thereof as the commissioners deem advisable, are hereby declared to be a public park, *the actual appropriation occurs when the commissioners make their decision.*

"There can be no doubt that the actual appropriation of the property by the city occurred when the commissioners decided that all the land described in the act should be acquired and the value of the land appropriated should be estimated as of that date."

*In re: Mayor*, 58 N. Y. S. 58.

"Where a city gives to a railroad company a right to elevate its tracts by building a wall on a street, the

property of an abutting owner is deemed taken or injured whenever the work of the railroad company has progressed to such an extent as to make the construction of the wall reasonably certain for the owner could then only sell his property for less than he could have got for it before it was generally known that the wall would be constructed, and after the construction has commenced every prospective purchaser would have the right to assume and would assume that it will be completed."

*Louisville & N. R. Co. v. Lambert*, 33 Ky. L. R. 199, 110 S. W. 305.

In *Ft. Wayne & S. W. T. Co. v. Fort Wayne & W. R. Co.*, 83 N. E. 665, 16 L. R. A. (N. S.) 537, the act governing condemnation of right-of-way by railroad companies provided that "the corporation shall forthwith deposit with the clerk of the circuit court or other court of record wherein the land lies, the description of the rights and interests intended to be appropriated and such lands, rights and interests shall belong to such company to use for the purpose specified by making or tendering payment as hereinafter provided." The court held that under this statute the filing of such instrument specifically *describing the property seized and declaring the intention of appropriating it*, (as is done by the Flood Control Act of May 15, 1928), is the formal assertion of the absolute right to appropriate it, and nothing remains to be done but to compensate the owner; that *the act of filing this instrument constitutes the taking and the right of the landowner to damages is then complete*; that by the filing of the instrument of appropriation the right to take the land becomes fixed but does not become complete nor carry the right of possession until the damage has been paid or tendered;

that all damage flowing from the construction and proper operation of a railroad, both present and prospective, is ascertainable and assessable as of the time or date of the seizure or taking of the property, which is the filing of this instrument of appropriation.

*In Hampden, etc., Co. v. Springfield, etc., R. Co.*, 124 Mass. 118, the plaintiff brought proceedings to have its damages ascertained for the taking of its land by the construction of defendant's railroad. The question was as to the time when the taking had occurred. The court, after stating that the statute authorized railroads to lay out their road five rods wide and required them to file the location of their road with the County Commissioner, held that the railroad gained its rights and the plaintiff sustained its damage by *the filing of the location*; that *this filing constituted a taking* of the land and that the damages were to be assessed as of the filing of the location, and not as of the date when the land was entered upon and the construction of the road commenced.

*In In re: Department of Public Parks*, 6 N. Y. S. 750, the Legislature on June 14, 1884, authorized the city of New York to acquire title for the use of the public to the whole or any part of lands therein described by metes and bounds. The act provided that when the Board of Street Opening and Improvement shall have decided it to be for the public interest to acquire title to the lands so described in the act, it shall make application to the Supreme Court for the appointment of commissioners to assess the damages specifying lands required for the improvement. Subsequently, commissioners were appointed. They made their report in 1888 but valued the land as of June 14, 1884, the



date of the passage of the act. The court held that the appraisement was properly made as of this date because the act described by metes and bounds the lands taken and *the legislative intent was that they should be taken immediately*, the work of the commissioners being merely to ascertain the price to be paid so that the city could acquire title.

In *People ex rel. Canavan v. Collis, Commissioner of Public Works*, 46 N. Y. S. 727, the Legislature in 1894 declared certain lands to be a public park and required the city of New York to condemn them and have them appraised. The act described the lands by metes and bounds. The court said:

"The statute provided a complete scheme for the condemnation of the property and the payment of the price which should be awarded to the owners, and it operated to condemn the land and appropriate it for public use. In re: Mayor, etc., 99 N. Y. 569, 580, 2 N. E. 642; In re: Public Parks, 53 Hun. 280, 6 N. Y. Supp. 750. From the time of the passage of the act and *certainly from the time when the lands therein were located by the filing of the map*, they were fully appropriated and set apart for public use, and the duty of taking proceedings to appraise their value arose; and, as was held in the cases last cited, the value was to be appraised as of the time *when the land was taken by the passage of the act*. The law gave to the municipal authorities of the city of New York *no locus poenitentiae*, or right to discontinue the proceedings; but the statute made it obligatory upon them, not only to take the proceedings for condemnation, but to pursue those proceedings to a final report. The case is not one where it lay in the discretion of the commissioner of public

works or the department of public works whether or not to take lands, or whether or not to continue proceedings which had once been begun for the condemnation of land; but *the taking of this land was the act of the Legislature*, and the absolute duty of having it appraised was imposed upon the city, without any right or power to discontinue it. *The rights of the parties, so far as the taking of the land is concerned, were fixed by the statute.*"

In *Chelton Trust Co. v. Blankenburg*, (Pa.) 88 Atl. 664, the Legislature directed the common council of the city of Philadelphia to obtain by dedication or purchase an adequate number of squares to be opened as public places for the health and enjoyment of the people, and it was provided that whenever the council selected a square or area for that purpose, if they could not agree with the owner as to the price to be paid, they were authorized to institute proceedings for assessing the damages to be paid. Under this act the city passed an ordinance selecting for park purposes certain lands of the plaintiff, and declaring that the tract had been selected and appropriated for that purpose. In construing the effect of this ordinance the court said:

"Appellee's land was practically taken and appropriated by the city of Philadelphia *the day the ordinance selecting it for park purposes was approved and such appropriation of it to public use will continue as long as the ordinance is unrepealed*. When the land shall be actually taken and turned into a park, the date of taking will relate back to the date of the ordinance. (Citing cases.) Though the appellee may remain in possession of the land until the damages for its taking have been paid or secured, such occupation can be but permissive, at all times subject to the

paramount rights of the public. The land cannot be built upon or improved, except at the hazard of the improver, and it is *worthless for sale*. \* \* \* This being the situation, appellee's absolute right is to have paid or secured to it the damages which are now due it."

In *In re: Philadelphia Parkway*, (Pa.) 95 Atl. 429, the city council passed an ordinance for the establishment of a parkway upon the city plan. Thereafter the Department of Public Works directed the plotting of the parkway upon the confirmed plan, which was done. Thereupon, the city by condemnation or purchase, from time to time acquired title to various properties within the lines of the confirmed plan and up to the time of the action had expended upwards of five million dollars on the project, and was *committed to the improvement*, though *intended to complete it at its own convenience*. Plaintiff owned a lot, which was entirely within the lines of the proposed parkway, on which he had erected a dwelling house. The city asserted the right to proceed with the work from time to time in the aforesaid manner, without having to make compensation until the council passed an ordinance opening the boulevard, irrespective of any injury that may have been sustained by a property owner. The city's theory was that such ordinance for the opening of the boulevard was necessary in order to constitute a taking of the property for public use. The court conceded such to be the general rule established by the cases, but took the view that the case then before it presented a situation not contemplated, either by the rule or reason of the decided cases.

"This great boulevard is not intended for the ordinary purpose of commercial travel. Its purpose is to add charm and beauty to the city and to give pleasure to its

population. It is a defined public way within specified and limited boundaries. It cannot serve the purpose for which it was intended until completed. A completion in part would serve no useful public purpose, and moneys expended on the unfinished undertaking would be deemed wasted. The parkway must therefore be regarded as *one entire public improvement* and it is important to keep this thought in mind in discussing the principles of law here involved. What then is the legal status of appellant in the present case? \* \* \* The constitutional mandate is that there shall be 'just compensation for property taken, injured or destroyed,' and that the property of appellant was injured by what the city has done is averred in the petition and not denied by any one. It must therefore be accepted as an established fact for the purposes of this case. The petition sets out in detail numerous ways in which appellant has been injured, and we have no doubt that the averments are true in fact. We do not understand that the city disputes the facts, but *it stands upon the ground that the time has not yet arrived to assess the damages*, and this because no formal ordinance to open has yet been passed by councils. More than ten years have passed since the beginning of the undertaking without an ordinance to open. During this period lands have been condemned for parkway purposes in some instances, properties purchased in others, improvements have been made and work done on parts of the boulevard, and \$5,000,000 (*one-third of the estimated cost of the entire improvement*) have been expended."

After reviewing certain cases the court continued:

"The plain inference from this language is that, *if the city did some unequivocal act evidencing an intention to*

open, followed by actual work done on the projected street, the right to compensation under proper circumstances might accrue even if councils have failed or neglected to pass an opening ordinance. In the very nature of things such cases would be exceptional; and we only mention the excerpts above quoted to show that the principle has been recognized as applicable when the facts warrant its application. The present case belongs to this exceptional class. Here we have not one but a series of unequivocal acts covering a period of years and all evidencing the intention of the city to open and complete the parkway. In furtherance of the intention to open and complete the undertaking lands have been condemned under the power of eminent domain, properties purchased, improvements made, and large sums of money expended. The city is just as irrevocably committed to the improvement as if the ordinance to open had been passed. The termini of the boulevard are definitely fixed by city hall at one end and Fairmount Park at the other. The courses and distances are marked on the ground and at some points the parkway is open to public use. Buildings have been torn down at each end and a large amount of work done looking to final completion. As hereinbefore stated, the parkway must be regarded as one entire improvement, it is either this or nothing. The city has committed itself to this improvement by its acts just as much as if councils had declared their intention by passing an ordinance to open. The law looks to the substance and not to the form. It is futile to argue that councils have not committed the city to the opening when they have already appropriated millions of dollars for this purpose. We consider what has been done as the equivalent of notice to the property owners that their lands would be appropri-



ated for parkway purposes and that their possession was  
about to be disturbed." 95 Atl. 429.

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## APPENDIX F.

**The official History of CUT-OFFS in the Mississippi River.**

(The following historical facts are taken from "Mississippi River Flood Control and Navigation" issued by the War Department, U. S. Corps of Engineers, United States Waterways Experiment Station, Vicksburg, Mississippi, May 1, 1932, in 3 volumes, which will be hereinafter referred to as "M. R. F. C. & N.")

*First artificial cut-offs.* In the year 1831 a bold attempt was made to improve navigation conditions at the mouth of Red River by an artificial cut-off proposed by Captain Shreve. This cut-off was followed by a second artificial cut-off made at Raccourci Bend several miles below by the State of Louisiana in 1848. Subsequent history has shown that as navigation improvements *they were a failure.* (M. R. F. C. & N., p. 7.)

During the period 1765-1929 the aggregate shortening of the lower river by cut-offs amounted to 228 miles. The 20 recorded cut-offs shown in Table IX (p. 59) have shortened the river channel by an average of 12.5 miles per cut-off. *However, the length of the lower river in 1929 did not differ greatly from the length in 1765.* Compensatory lengthening has taken place to offset the temporary channel shortening resulting from cut-offs. (M. R. F. C. & N., p. 61; and R. 280.)

The sole effect upon discharge is a slight reduction in channel storage due to depression of stage within the upstream limit of cut-off influence. In the normal case this has no perceptible effect upon the discharges below the cut-

off. Channel characteristics below the cut-off are *not permanently changed* (M. R. F. C. & N., p. 61).

Ellet's Report of 1852 is contained in Com. Doc. No. 5, 70th Congress, 1st Session. This report made pursuant to an Act of Congress states "that the *floods* in the Alluvial Valley of the Mississippi River *would increase in frequency and extent* with the increase in cultivation in the valley and the extension of the levee system. His proposals for the control of Mississippi floods included *the prevention of cut-offs.*" (M. R. F. C. & N., p. 9.)

Ellet regarded cut-offs as "*an unqualified evil*" on the lower Mississippi River. (M. R. F. C. & N., p. 300.)

The Delta Survey submitted in 1861 discusses river hydraulics and the effects of cut-offs. The report concluded that plans for channel improvement by cut-offs were *too dangerous* and costly to be adopted. (M. R. F. C. & N., p. 10.) "Both Ellet, and Humphreys and Abbot agreed that cut-offs were *dangerous to the regimen of the river.*" (M. R. F. C. & N., pp. 60-61.)

The federal "Levee Commission" reported in 1874 "that cut-offs were *pernicious* in their effects." (M. R. F. C. & N., p. 12.)

On May 16, 1913, the President of the Mississippi River Commission reported to the President of the United States that cut-offs were *neither efficacious nor practicable* for flood control or the prevention of floods on the Mississippi River (M. R. F. C. & N., p. 18).

*Definition, and Description of formation.* The phenomenon known as a cut-off is characteristic of alluvial rivers, and the Lower Mississippi is no exception to this hydraulic

rule. The manner in which a cut-off occurs is easy to understand. The lower river channel is a series of reverse curves or bends which tend to lengthen themselves. Under conditions favorable to this process, these bends ultimately become great loops whose necks are very narrow. The length of a typical bend may vary from 8 to 15 miles. On the other hand, the shortest distance across the neck may not exceed three-quarters of a mile. Unless the banks of the neck are protected, active and continuous caving takes place. In the natural state of the river, this continued bank caving narrowed the neck until a "break-through" occurred and a chute channel was formed across the neck. This chute had the same total fall as the old channel around the bend. *Current velocities through the chute were consequently relatively very great*, and the chute enlarged until it ultimately accommodated the entire discharge of the river. The old channel thereupon silted up its ends and formed an ox-bow lake. The term "cut-off" is applied by common usage to the shortened chute channel across the old bend. (M. R. F. C. & N., p. 58.)

"Moreover, the policy of the Mississippi River Commission between 1884 and 1928 contemplated *the prevention of cut-offs*, and none were allowed to occur during that period. (M. R. F. C. & N., p. 60; R. 247.)

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*Finis.*

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1939

UNITED STATES OF AMERICA *Petitioner,*

v.

No. 72.

MRS. JULIA CAROLINE SIØNENBARGER, ET AL., *Respondents.*

CERTIORARI TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE EIGHTH  
CIRCUIT

SUPPLEMENTAL BRIEF FOR RESPONDENTS

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**UNITED STATES OF AMERICA**.....*Petitioner,*

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**CERTIORARI TO THE UNITED STATES CIRCUIT  
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---

**SUPPLEMENTAL BRIEF FOR RESPONDENTS**

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**ERRATA IN MAIN BRIEF**

Wherever occurring in the Subject Index the word "Appellant;" should be *Respondent*; and the word "Appellee" should be *Petitioner*.

In the Circuit Court of Appeals the petitioner in this Court was the appellee; and the respondents in this Court were the appellants.

## ARGUMENT

Of necessity, caused by the delayed filing of petitioner's Brief, the respondents prepared and printed their main Brief in this case before seeing either of petitioner's briefs. It was assumed that, notwithstanding different attorneys in this Court, petitioner would rely upon the same arguments advanced in the Circuit Court of Appeals. It now appears that with each change of attorneys petitioner shifts its defense tactics. Respondents therefore crave the indulgence of the Court in presenting this their Supplemental Brief.

A careful study of petitioner's briefs in this Court now indicates that petitioner's present defense contentions may be summarized as follows:

1. The Boeuf Floodway was never constructed, and the fuse-plug levee at its head does not exist.

2. The non-existent Boeuf Floodway, and its fuse-plug levee, have now been abandoned.

3. Respondent's land is now *better protected* than before the 1928 Act: because, (a) the *levees on the south bank of the Arkansas River* have been strengthened, independently of the 1928 Act, and (b) the experimental *cut-off program* initiated after 1932 has decreased flood hazards, and (c) the authorizations of the 1936 and 1938 Acts for (1) works on the lower river and (2) reservoirs *may*, when completed, further decrease flood hazards to respondent's land.

Petitioner undertakes to support these three assaults on the constitutional rights of the respondent by the oriental method of argumentation with endless repetition. Its attor-

neys seek to induce hypnotic acquiescence by the simple formula of monotonous re-assertion.

With subtle naivete, the indisputable physical facts and unquestionable public records, to say nothing of the uncontradicted record evidence before the Court, all presented by our main brief, are of necessity ignored.

The initial and fundamental issue to be determined is shall this Court now reverse the heretofore well-established principle that the Fifth Amendment requires that just compensation shall be paid *as of the time of the taking*, and is equivalent to "*the market value of the property at the time of the taking contemporaneously paid in money.*" *Olson v. United States*, 292 U. S. 246; 54 S. Ct. 704, 78 L. ed. 1236, at p. 1244. Unless the Court now departs from this decisive principle, then all of the speculative discussion of petitioner as to the possible effect of cut-offs, reservoirs, and suggested possibilities of future modifications of plans as authorized by the Acts of 1936 and 1938 are entirely irrelevant, and cannot be considered. This constitutional principle of just compensation *at the time of taking* leaves petitioner without substantial defense. All of the matters which they urge as possible mitigation of damages, and in support of their plea of "Added Protection," were developments long years after respondent's property had been taken, and her loss had been sustained.

## I.

Petitioner continues to reiterate its ungrounded assertion that "*the Boeuf Floodway was never commenced*" (Br. 50), and that "*no fuse plug exists*" (Br. 17).



This erroneous premise is completely refuted by the record in this case presented in Point III of our main brief.

This contention of petitioner must indeed be startling news to the Chief of Engineers, who as long ago as January, 1936, assured the Congress that the flood control construction work authorized by the Act of May 15, 1928, was essentially complete (R. 147-148; Hearings Senate Commerce Committee on S. 3531, January 27, 1936, pp. 59-52). The impossible burden of the vast and difficult problem of Mississippi River flood control to which petitioner refers (Br. 14) has, in the judgment of the Army Engineers, been practically solved (see quotations Point III of main brief).

The Mississippi River recognizes only physical facts. Petitioner frankly discounts the force of the actual existence of the fuse plug levee as "a physical fact" (Br. 17-18, 54). Admittedly, as a physical fact, pursuant to the Flood Control Act of May 15, 1928, the levees on the east bank of the Mississippi River, and the levees north and south of the presently existing fuse plug on the west bank of the Mississippi, have long since been raised and strengthened to such an extent that the fuse plug levee must, of physical necessity, discharge all water from the main channel in excess of the safe carrying capacity of the river before any other levees are seriously endangered. These physical facts create the fuse plug levee, and protect the balance of the levee system from destruction, sacrificing the Boeuf Basin for the protection of the rest of the alluvial valley.

Petitioner undertakes to justify its anomalous assumption by asserting: "Until the *guide levees* are completed, there is no purpose to have the floodwaters go over the fuse plug" (Br. 54). On the contrary, since 1931 the suc-

cessive Chiefs of Engineers have assured the Congress that "these levees (guide levees) are *not essential to the proper functioning of the plan*" (Doc. 798, pp. 26, 47; R. 138, 139); and as late as March 22, 1939, the Jadwin Plan was still actually operating "*true to its design*" (main brief p. 67). Counsel simply ignore the unquestionable record—a physical fact which has constantly confronted and menaced every inhabitant of Boeuf Basin for the last seven years.

With frank inconsistency, petitioner finally assures the Court that, after all, the building of the proposed guide levees would be wholly immaterial to respondent's cause of action, because even the building of such guide levees to protect other areas would not amount to a taking of respondent's land, nor create any cause of action (Br. p. 51, note 26).

## II.

The second basic unrealized premise from which petitioner concludes there is no liability in this case is its unsupportable assertion that the Boeuf Floodway has been abandoned. This argument also disregards the physical fact of the existing fuse-plug levee, which would remain as a fuse-plug even under the proposed Markham Plan of the 1936 Act which suggests the possibility of shifting the proposed guide levees into the Eudora Floodway, but leaves respondent's land in the floodway under either plan.

The fallacy of this hypothesis is made manifest by the cumulative record in the case at bar presented in Point VI of our main brief.

Furthermore, petitioner now reduces its argument to absurdity by demonstrating, to its satisfaction, that in con-

trolling the floods of the Mississippi River the United States can *never* be guilty of taking private property for public use, because: "There will, therefore, invariably be constant changes in flood-control plans" (Br. 14). Petitioner frankly confesses in its Supplemental Brief: "Congress does not contemplate immediate construction of the Eudora floodway"; and adds impressively "flood-control plans for the Mississippi shift their course fully as rapidly as does the river, and it is *by no means certain that construction will ever be commenced*" (Br. 20). Counsel amplify their position by again stating: "There will, in other words, always be changes and improvements. No man has yet dared to assert that *the plan for Mississippi flood control has been found—the plan which cannot be improved and will not be modified*" (Br. 25). And finally petitioner submits: "The scope of respondent's claim may best be illustrated by supposing the not improbable contingency of another change in flood-control plans for the Tensas Basin. *If the Government were to decide, on the experience of the last decade, that the straightening and deepening of the channel between the Arkansas and Red Rivers was itself sufficient protection, it is not unlikely that the Cypress Creek fuse-plug would be raised to the height of the other levees*" (Br. 31). (Italics supplied.)

In other words, *the Constitution requires* that respondent recover in this action "the market value of the property *at the time of the taking* contemporaneously paid in money." *Olson v. United States, supra*. Petitioner argues, No. She must first wait for eight (8) years (1928 to 1936) to see if science and experience cannot collaborate to devise some new method by which a portion of the market value of her property may be restored; and then she must further

wait until the Congress of the United States authorizes an attempt to accomplish that desirable result; but, that attempt having failed, she must now wait *indefinitely* and *forever* before asserting liability because, perchance, "no man has yet dared to assert that *the* plan for Mississippi flood control has been found" and "Congress must have freedom to make the necessary changes"—until such time as respondent and her generation have passed into the shades of eternal disappointment and oblivion.

If petitioner's argument on this point be sound, we frankly confess there can never be "a taking" of respondent's property requiring constitutional compensation, because there will forever be a possibility of change, even in the congressional mind.

The suggestion that the fuse-plug levee *may* some day be raised three feet to the grade and section of all other levees in the alluvial valley, thus restoring to respondent the equal protection of which the 1928 Act deprived her, is especially unfair to respondent and unfortunate for petitioner. It is absolutely true that the Boeuf Floodway, as a physical fact, can never be abandoned until that is done. Only such raising and strengthening of the levee can destroy its present existence as a fuse-plug. Only the actual destruction of the fuse-plug by giving it the strength and grade of all other Government main stem levees can satisfactorily end all of the futile conjecture as to the future in which petitioner now indulges.

But, every effort to induce the Congress to so raise the fuse-plug levee, and to thus abandon this floodway, has met with instant and vehement opposition by the Army Engineers and has been promptly rejected by the Con-

gress. As early as 1934 bills were introduced for this purpose (H. R. 8146 and H. R. 8048). In the Hearings of February 27, 1934, on these bills the Chief of Engineers emphatically advised the Congress: "Emphasizing my sympathy, and I feel very kindly with the people certainly in these two basins, I still would think *it would be courting disaster to raise the fuse-plug levee until the matter is really settled.* I do not know what would happen if you let two and a quarter million feet go past the fuse-plug" (p. 28; R. 141).

*And so has it ever been until the present moment.*

Even if the fuse-plug levee should ever be built up equal in grade and strength to the adjoining and opposite levees, thus actually abandoning the floodway behind it, respondent, if still alive, would not thereby be compensated for the market value of her private property taken for public use more than ten-years ago. She bought this property in good faith in 1927 for \$125 per acre. For the past *ten years* it has been without substantial market value *solely* because it was "taken" and dedicated by her sovereign Government for the benefit of the Nation. Nothing short of judgment in this *case* can, in the constitutional sense, restore that loss already sustained so long ago.

Of course the Court will bear in mind that petitioner's entire speculative discussion of the modification of the Jadwin Plan by the Flood Control Act of June 15, 1936, is wholly academic in so far as it affects respondent's land. The substitution of the Eudora Floodway for the Boeuf Floodway would affect large areas west and southwest of respondent's land (most of the present Boeuf Floodway), but it would bring *no relief to respondent* because her land



is in either floodway behind the same, identical fuse-plug levee.

### III.

"Added Protection" to respondent's lands? A. Generally.

The final, fanciful premise proffered by petitioner is its belated, much-reiterated assertion that: "The lands in the Boeuf Floodway now have more flood protection than they have ever before received. In the event of a sufficiently severe flood her lands are almost certain to be flooded, but this was the case before" (Br. 13). "The land is subject to no additional flood danger; indeed, it is better protected than ever before" (Br. 30-31).

The first reaction to this startling assertion is to exclaim: "Then why ever a floodway at all! Has this entire 'floodway' program been only a cruel and expensive hoax for the past ten years?"

Of course it is not claimed that this was true at the time respondent's property was taken, nor when her suit was filed, when she should have been paid the then market value of her property, contemporaneously with the taking. *Olson v. United States, supra*.

In the three trials of this case (D. C., C.C.A. and here), the petitioner has changed its attorneys and shifted its defensive positions with facility equal to that with which it asserts it is necessary to constantly shift the flood-control plans of the Mississippi River. Judging from the incessant repetition of its allegation of "better protection," obviously reliance is now finally placed on this charge in this court of last resort.

This sophistry is really a new issue not made by the pleadings in the case (R. 18-21, 77-80).

The very assiduity with which counsel here harp upon this belated fiction, happily repeating the seductive asseveration at every possible opportunity throughout their briefs, arouses just suspicion. It is a well-known mental law that one finally comes to believe whatever he repeats to himself for a sufficient length of time, *whether the statement be true or false*. The constantly reiterated false suggestion is eventually accepted as truth. Moreover, it is ultimately *believed* to be true. Hence the doubtless presently sincere enthusiasm of petitioner's counsel.

Our entire main brief completely refutes this final stand of the petitioner. Every *fact* in the record shouts disagreement. The very purpose of the Jadwin Plan as a whole is to the contrary. To say that confining the 500,000 c.s.f. of water that flooded the State of Mississippi in 1927, plus all the other vast volumes of water that escaped elsewhere from the main stem of the river, and artificially diverting this multiplied-Niagara torrent against and through the fuse-plug levee over respondent's land—to say that such a plan and result gives respondent's land "added protection" is, we submit, absurd on the face of it. To us who live behind that fuse-plug it is tragically false. No dweller in the alluvial valley, familiar with the actual physical facts, would so contend. One must dwell in an atmosphere of security, far from the scene of actual danger, to work out any such theory.

The respondent has not been relieved by any such groundless hallucination. There are no buyers for her condemned property.

The Chief of Engineers is not deluded by any such futile hope. He conscientiously recommends that the United States pay for flowage rights over the floodway property from 75 per cent to 80 per cent of the real value of that property as representing just compensation for *values actually destroyed* (Hearings on S. 3531, Senate Commerce Committee, January 27, 1936, at p. 38).

The Congress of the United States labors under no such misconception. It emphasizes the falsity of any such supposition by authorizing the payment of \$20,000,000 for 75 per cent of these necessary floodway flowage rights as just compensation for destroyed values. See sec. 12 of Act of June 15, 1936, 49 Stat. 1508.

The President of the Mississippi River Commission observes: "Fundamentally, the difficulty down through the Delta and the valley is the fear of a flood. The actual damage from a flood is almost insignificant compared with *the fear of a flood*. Now, *that is ever present*, and we should get a real solution. \* \* \* But the *development cannot proceed*, in comparison with the rest of the United States, so long as the situation is such that any man of average intelligence cannot go and look at the results and *know* that we will never have a flood menace again" (Hearings on S. 3531, Senate Commerce Committee, January 27, 1936, at p. 74).

Common sense, with a look at the map, refutes any such erroneous argument of "better protection" by the mere physical facts involved. The Boeuf Floodway property is deliberately sacrificed for the explicit purpose of protecting the balance of the alluvial valley. How could the diversion of a violent, destructive flood, several times the

volume of Niagara Falls, over a fast-land, agriculturally-developed, countryside give that area "better protection"!

To support its theoretical delusion petitioner repeatedly recalls that respondent's land was flooded in 1912, 1913, 1919, 1921, 1922 and 1927; and that it has not once been flooded since 1928. The explanation is simple.

Petitioner disregards the undisputed record fact that prior to 1922 there was a gap in the levee at the point where Cypress Creek emptied into the Mississippi River. All of the surface flood water of the Cypress Creek watershed went into the Mississippi River through this gap. Hence, whenever the Mississippi River rose above its natural banks the water flowed through this outlet at the mouth of Cypress Creek and ran south behind the main stem levee. For many years the property owners in this area, including the respondent, had been annually taxing themselves and bonding their property for the purpose of constructing a flood-proof levee from the Arkansas state line on the south up the south bank of the Arkansas River to the head of the Mississippi River back-water area on the north. The individual levee districts which had done this work for a generation were finally merged into a local organization called the Southeast Arkansas Levee District, covering the entire area. Everybody knew that the work could not be finally effective until the gap at the mouth of Cypress Creek was closed; but this gap could not be closed until a new, gigantic drainage system could be constructed inland to take care of these surface waters that for ages had been flowing naturally through Cypress Creek into the Mississippi River. This drainage work was done at enormous expense, with great bonded indebtedness, by the local property owners

organized under the name of the Cypress Creek Drainage District.

When this drainage system was finally ready to function in the year 1921 the gap in the main stem levee at the mouth of Cypress Creek was then closed, and the property owners were assured by the United States Chief of Engineers of complete flood protection thereafter from the Mississippi River flood waters. His assurance is justified because since the gap was closed and the levee was thus completed along the main stem of the Mississippi River in 1921, that levee (now taken by the United States as a fuse-plug levee), has in fact never failed, or been breached. Therefore, no one was excited when flood waters from the Mississippi River in the years mentioned by petitioner came through the outlet in the gap of the levee at the mouth of Cypress Creek, because everyone could see the work of levee building rapidly progressing and *knew* that the time was almost at hand when this gap would be closed, and flood protection would be complete. For this reason, and because of this assurance, market values for land in this area were constantly increasing during the very years that petitioner reminds the court water was escaping naturally from the Mississippi River and slightly inundating some of the inland area.

Of course petitioner stresses the flood of 1927 which inundated respondent's land to a depth of 20 feet. So also was all of the county seat at Arkansas City then under 20 feet of water. So also was all of the green area shown on the maps before the Court inundated in 1927, thousands upon thousands of acres of land, villages, towns, railroad lines, highways, industries and all the other indicia of a highly developed civilization there found. But petitioner



admits that the flood of 1927 was "*unprecedented*" (Br. 4). Surely even petitioner cannot claim that all of the vast area of land flooded in 1927 is a natural flood bed of the Mississippi River, and is forever subject to a servitude for all future floodings by the United States. If so, what becomes of the vast, highly developed, rich Delta area of the State of Mississippi?

Of course the Court will not forget that the 1927 flood in the Boeuf Basin area came from breaches in the levees on the south bank of the *Arkansas River* which had not then been completed; but even petitioner admits that these levees on the south bank of the Arkansas River, pursuant to the program on which the local interests had been assiduously working for years, *independent of the 1928 Act* (Br. 9, 48, 49, Note 25), were restored and *completed* shortly after the 1927 flood. *Therefore*, the local property owners had reached the consummation of their fight for complete flood protection against water from both the Arkansas River and the main stem of the Mississippi River, and knew that levees elsewhere (as in the State of Mississippi) would break for their future protection; when suddenly, without warning, like a murderous bolt from the blue, the fruit of their labor, and the result of their enormous expenditures, was practically destroyed by the passage of the Flood Control Act of May 15, 1928, which took their reclaimed and protected lands for a national floodway. The simple truth is that respondent's land had been reclaimed and protected by voluntary *taxation* when it was deliberately destroyed by involuntary *legislation*.

Petitioner also repeatedly insists that there have been the "*three great floods*" of 1929, 1935, and 1937, since the

passage of the Flood Control Act of 1928, and respondent's land has not once been flooded (Br. 11, 13, 32, etc.).

Again great distance and utter unfamiliarity with local conditions doubtless accounts for petitioner's error. For the property owners south of the mouth of the Arkansas River there has been *no great flood* since 1928. There can *never* be a "great flood" for this area until a flood of approximately 2,000,000 c.s.f. comes down from the upper Mississippi River to the mouth of the Arkansas River *at a time when the Arkansas and White Rivers are also contemporaneously discharging their own flood into the main stem of the Mississippi River.* This condition has not occurred since 1928. The so-called floods of 1929 and 1935 were not noticed at all in this area *south of the mouth of the Arkansas River* where respondent lives. Even the greatest of the floods mentioned by petitioner, that of 1937, aroused no anxiety in this area because long before the crest of the Ohio River flood reached the mouth of the Arkansas River it was noted by all concerned that, thanks to a Gracious Providence, both the Arkansas and White River watersheds were practically dry, and the enormous back-water storage area of approximately 1,200 square miles at the mouths of the White and Arkansas Rivers was practically empty. Hence, every property owner below the mouth of the Arkansas River knew (1st) that when the 2,000,000 c.s.f. flood from the Ohio valley did reach the mouth of the Arkansas River it could, and would, be safely carried past the fuse-plug levee as petitioner alleges; and they also knew (2nd) that when this Ohio River flood reached the mouth of the Arkansas River a large portion of it would be absorbed by the empty storage basin constituting the entire backwater area at the mouth of the White and Arkansas Rivers, thus

completely eliminating all possible danger to the fuse-plug levee. And so it was.

But these same property owners know just as surely that whenever any flood of approximately 2,000,000 c.s.f. comes out of the upper Mississippi River, or any of its great tributaries, to the mouth of the Arkansas River at a time when the Arkansas and White Rivers are *also* in flood stage, *the fuse-plug levee must go out* and the spillway at the head of Boeuf Basin will function *as designed by law*.

"*Added Protection*" to respondent's land? B. Specifically.

Whence cometh this "*Added Protection*"? HOW is respondent's land better protected?

Petitioner asserts that respondent's land is *now* (in 1939, ten years after its taking) "better protected" (1st) "by the strengthening of the levees on the south bank of the Arkansas River" (Br. 30, 48); and (2nd) "by the construction of cut-offs" (Br. 30, 48); and (3rd) by (a) recent works on the Lower River and (b) the proposed Reservoirs authorized by the Acts of 1936 and 1938 (petitioner's Supplemental Brief).

Each of these alleged reasons for "better protection" quickly disappear when carefully examined and considered.

1. *Arkansas River levees.* As hereinbefore shown, this protection was *already assured* prior to the passage of the 1928 Act, and independent of it. This protection was largely the result of efforts on the part of the local property owners extending over a long period of time. By the Flood Control Act of May 15, 1928, the United States has now rendered those Herculean efforts futile in so far as respon-

dent's land is concerned by the simple expediency of gathering this destructive Arkansas River flood-water into the main stem of the Mississippi River only to be immediately thereafter hurled through a fuse-plug levee directly over respondent's property. Wherein then lies the alleged "benefit" to this property?

2. *Cut-offs.* This alleged "benefit" is thoroughly disposed of by the Record as presented in Point VII of our main brief.

Petitioner now frankly admits in its Supplemental Brief that: "The Jadwin Report *unequivocally rejects* this alternative (cut-offs) as too uncertain, because of the fear of the increased velocity of the water and the possibility that new bends will be formed." How then can any possible alleged benefits from cut-offs be considered in this case when the idea of trying them originated long after respondent's property had been taken and after the present fuse-plug levee was actually in an operative condition to function as designed—that is to say, after 1932—whereas the Constitution requires that respondent should have received as her just compensation the full market value of her property "at the time of the taking contemporaneously, paid in money." *Olson v. United States, supra.*

When the chairman of the Senate Subcommittee of the Commerce Committee (Senator Overton) in 1936 asked the President of the Mississippi River Commission, "the father of the cut-offs," if cut-offs are "safe as a substitute for a floodway such as the proposed Eudora floodway," General Ferguson emphatically replied: "No, sir; you can't say that" (Hearings, Senate Commerce Committee on S. 3531, January 27, 1936, at p. 78).

The Chief of Engineers in Document No. 2, 74th Congress, 1st session, called to the attention of the Committee on Flood Control of the House of Representatives that: "Cut-offs being made at the Greenville Bends in the neighborhood of Greenville and Arkansas City *should* result in a lowering of the flood stages in that locality, but *will not lower the flood stages below the cut-offs. The definite effect of these cut-offs on flood stages cannot yet be determined.*" (p. 3.) And so it is until this moment.

### 3. *Authorizations of the 1936 and 1938 Acts.*

(a) Works on the Lower River. In its Supplemental Brief petitioner speculates as to what *may* be the effect of work now in progress on the lower river some 600 miles *below respondent's land*. The most casual consideration of the flood control *map* of the entire Jadwin Plan as prepared by the Army Engineers will eliminate this curious suggestion from further consideration. The physical conditions which destroy the market value of respondent's property lie *upstream* from the latitude of her land in the Government's flood control works which gather all of the surface water from the enormous watersheds of the Ohio River and its tributaries, the upper Mississippi River and its tributaries, the Missouri River and its tributaries, the White River and its tributaries, and the Arkansas River and its tributaries (R. 391), and designedly spills over the fuse-plug levee in front of respondent's property *all* of this enormous volume of water in excess of the safe carrying capacity of the levees below (which is approximately 2,000,000 c.s.f.), in order to protect the lower river levees and the enormous important areas of property protected thereby.

After respondent's property has been utterly destroyed by the breach of the fuse-plug levee, it is of little consolation



to her what the Government may do to further protect property owners 600 miles *downstream* from her. How can anything which the Government may do with the flood waters many days after they have destroyed and left respondent's property be of benefit to her land? When these flood waters finally reach the flood control works in the lower river to which petitioner refers their disposition there can be of little concern to respondent, and of *no relief* to her land already destroyed.

But again, this is not left as a matter for indecisive argument. The point has been officially disposed of by the President of the Mississippi River Commission. In the Hearings of January 27, 1936 (Senate Commerce Committee on S. 3531), Senator Overton expressly asked if these recommended works on the lower section of the river, *when completed*, would dispense with the necessity of having a Eudora Floodway for the escape of waters from the Mississippi River. General Ferguson unequivocally answered: "*You would require a floodway.*" (pp. 75-76.)

(b) *Reservoirs.* Of course there is nothing in the Record in this case about reservoirs because the case was tried in the lower court a year before Congress authorized the modest beginning of a program of reservoirs.

None of these dream reservoirs have yet been constructed. Funds for their construction are not available. Appropriations to *begin* an insignificant number of them have been authorized. War, or one year's national elections, can speedily "liquidate" the entire idea.

Petitioner unreservedly admits in its Supplemental Brief that no such relief was contemplated at the time respondent's property was taken. It truthfully states: "The

Jadwin Report rejected this alternative as too speculative unless developed for the local benefits of *local* flood protection, water storage and power projects."

When the Congress was being urged to authorize the construction of only 26 reservoirs in the Arkansas and White River basins, the Chief of Engineers, in an adverse report on May 15, 1935, reminded Congress that: "These reservoirs cannot be relied on to prevent a flood which will overtop the levees *unless a relief outlet is provided*" (Document No. 2, House Committee on Flood Control, 74th Congress, 1st Session, p. 3.)

In response to a request of the House Flood Control Committee for a report on a series of reservoirs which would "abrogate the necessity of fuse-plug levees and diversions from the main channel of the Mississippi River," on May 15, 1935, the Chief of Engineers replied: "The report indicates therefore that the costly system of reservoirs under study *would not abrogate the necessity for fuse-plug levees or similar works, and diversions from the main channel of the Mississippi River* to afford assured protection against extreme floods." (House Flood Control Committee Document No. 3, 74th Congress, 1st session; p. 2.)

On January 27, 1936 (Hearings, Senate Commerce Committee on S. 3531), the Chief of Engineers stated: "There is no means that we know about of holding any such amount of water, except and *unless the United States would take up reservoirs throughout the entire country and, for the single purpose of withholding water, expend about \$1,260,000,000*" (p. 37). "I repeat that if we are to get this river under control, it is by this class of control: by building the levees and by the plan of taking out this water by means

of *spillways*, or if you get *reservoirs* from year to year, bearing in mind that it is *rather unthinkable that you would have a big proportion of them in less than 20 or 30 or more years*. I would say to this committee what I said to the House committee: *'You must regard your reservoirs, as far as control is concerned, as just so much fat'* " (p. 39).

In referring to reservoirs as "just so much fat," more commonly referred to as political "pork," the Chief of Engineers did not foresee the possibility of the further use of non-existent reservoirs as an argument before the Supreme Court in this case in 1939.

The respondent and her attorneys will long since have lost all interest in earthly floods, private property, and constitutional guarantees before any completed reservoir system lends any additional degree of safety to the Government controlled fuse-plug levee which destroyed property values in the Boeuf Floodway in the year 1929.

## CONCLUSION

If respondent had received just compensation for her private property at the time of its taking contemporaneously paid in money as required by the Constitution (*Olson v. United States, supra*), this Court would not now be confronted with the voluminous briefs in this case dealing with any of these irrelevant, recent proposals on which petitioner relies to avoid judgment. The constitutional requirement of just compensation, and the express congressional mandate that the United States shall provide flowage rights for this diversion of destructive flood waters

from the main channel of the Mississippi River over respondent's land, cannot be so easily evaded.

Respectfully submitted,

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IN THE

**SUPREME COURT OF THE UNITED STATES.**

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OCTOBER TERM, 1939.

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THE UNITED STATES OF AMERICA,  
Petitioner,

vs.

MRS. JULIA CAROLINE SPONENBARGER et al.

---

On Writ of Certiorari to the United States Circuit  
Court of Appeals for the Eighth Circuit.

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**BRIEF**

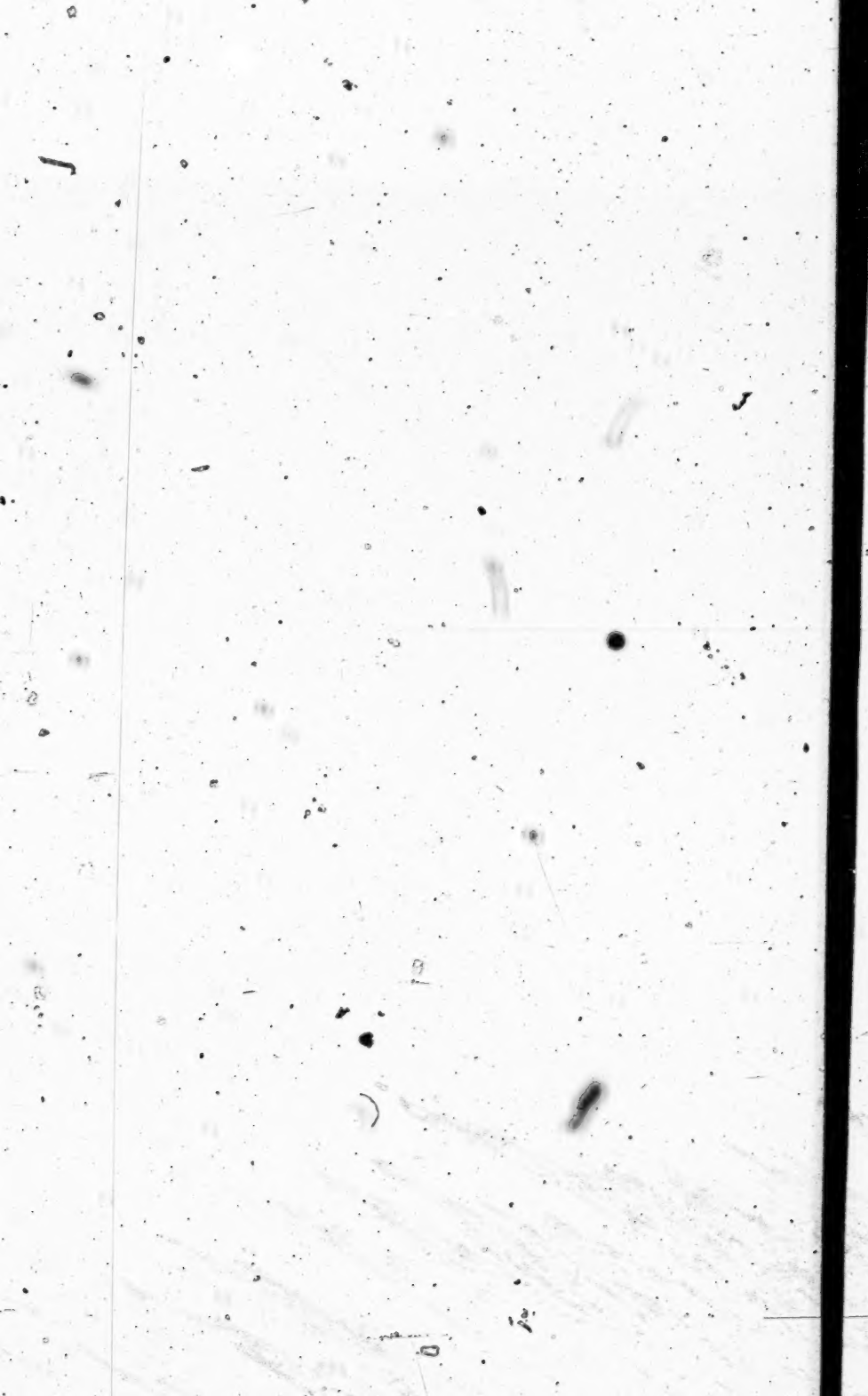
Of Respondents Mercantile-Commerce Bank & Trust  
Company and Mercantile-Commerce National  
Bank in St. Louis.

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**BRIEF**

Of Respondents Mercantile-Commerce Bank & Trust  
Company and Mercantile-Commerce National  
Bank in St. Louis.

---

**STATEMENT OF THE CASE.**

**THE TECHNICAL SITUATION.**

This is an action under the Tucker Act, 28 U. S. C. A., Section 41 (20), for compensation to plaintiff for the taking of an easement in land by the Government in the prosecution of the Mississippi River Flood Control Work. The sole original plaintiff, Mrs. Julia Caroline Sponenbarger, a respondent herein, is the fee owner of forty acres of farm land in which the easement is alleged to

have been taken. The United States, petitioner herein, was the sole original defendant.

Mercantile-Commerce Bank & Trust Company and Mercantile-Commerce National Bank in St. Louis, with others, were made additional parties on motion of the Government, which alleged that they claimed an interest in the land. By order of the Court granting the motion of the Government, they were specifically named by the Court as additional parties "plaintiff," although it is their understanding that additional parties thus brought in involuntarily by order are normally designated as "defendants." This designation of the additional parties as "plaintiffs" may have produced some anomalies. Their interest is adverse to that of the original plaintiff with respect to the ownership of the land and the proper disposition of any award that may be made for the taking of the easement. Their interest is identical with that of the original plaintiff with respect to the existence of a claim against the Government.

The trial court found for the Government and made no finding concerning the respective rights of the original plaintiff and the additional parties.

Appeal was taken by the original plaintiff and the additional parties. The additional parties deemed it necessary to participate in the appeal, as parties appellant rather than appellee under the rules governing appeals, because, having been forced involuntarily into the litigation as "plaintiffs" and so compelled to assert herein their claim against the Government, they did not want to hazard the technical possibility that the judgment below in favor of the Government and against them, although reversed on appeal of the original plaintiff, might be final against them in the absence of participation herein. However, the dispute between these additional parties and the original plaintiff was not a subject matter of the appeal. The ap-

peal relates solely to the cause of action against the Government, whoever may be the proper party to assert it.

The Court of Appeals reversed the trial court. The Government petitioned this Court for writ of certiorari, which was granted. It is assumed that Mercantile-Commerce Bank & Trust Company and Mercantile-Commerce National Bank in St. Louis are respondents, although they seem nowhere named. (See petition for writ, p. 3, especially the note, and brief for the United States, p. 3, especially the note.) The technical disposition made herein of them may be important.

Prior to the filing of the present suit the Mercantile-Commerce Bank & Trust Company and Mercantile-Commerce National Bank had asserted their claim against the Government in cases now pending in the Court of Claims of the United States. Their actions in the Court of Claims covered all of the land in the Boeuf River Basin and they are not voluntarily taking up their claims with reference to an individual "forty."

### THE GENERAL FACTS.

Mrs. Sponenbarger is filing an exhaustive brief and any repetition herein of details available in that brief will be avoided.

The general theory on which the present action and the actions in the Court of Claims are based is that the Government has taken an easement for a floodway across the Boeuf River Basin, thereby subjecting the land to a servitude which diminished its value, and compensation must be paid. The essential facts are simple. (Transcript pages cited are only illustrative. This statement is too general to permit detailed reference to the transcript.)

Below Cape Girardeau, the Mississippi River and the lower reaches of the tributaries of the Mississippi River

flow through an alluvial basin. Some of this alluvial basin is sufficiently high to be safe from floods, but most of it, except for artificial works, is subject to overflow. The size and location of the area overflowed, of course, varies with the size and location of each particular flood. The source of a flood, ordinarily, is one or another of the tributaries, and extreme floods on the Mississippi River itself are due to simultaneous floods originating on more than one tributary. (For possibly the best single statement of the physical situation, see House Document 90, 70th Congress, First Session, December 1, 1927, Exhibit 2, R. 119.)

Throughout the history of the Mississippi Valley, constantly increasing efforts have been made by local interests to protect particular portions of the alluvial basin from floods by means of levees. An attempt has been made over a considerable period of more recent years to co-ordinate these efforts through the Mississippi River Commission, which was created by the Federal Government. The general thought was that a system of local, although sometimes extensive, levees, constructed and operated by levee districts within the several states, if the construction and operation of the levees were co-ordinated through the good offices of the Mississippi River Commission, would ultimately result in complete flood protection for the whole alluvial basin.

The Mississippi River Commission finally worked out grades and sections for levees for the whole Mississippi alluvial basin, known as the 1914 grade and section, which it recommended to all local levee districts as sufficient for complete flood protection, and by 1927, by various devices, including federal aid, had accomplished much in persuading local levee districts to attain this ideal. (See House Document 90, R. 119, although a better statement of the history is to be found in the decisions of this Court cited in these proceedings.) It should be stated at this point that there always has been, and still is, considerable doubt

in the lay mind as to whether complete flood protection is desirable, let alone possible. A contrary view prevails in connection with the Nile Valley.

One of the disregarded, if not wholly unanticipated, effects of the efforts at flood control showed itself in the flood of 1927. This was an unprecedented flood. It was unprecedented, at least in part, because the levees built for protection purposes confined the river to a relatively narrow flood area and so raised the flood height and velocity, and correspondingly increased its destructive effect (R. 122, Secs. 76 and 77).

The 1927 flood secured general approval of the notion that Mississippi River floods were a matter for control, and for control by the Federal Government, rather than for control by local levee districts. The notion that control is a matter for the Federal Government is based partly on the magnitude of the undertaking, which calls for financing beyond the ability of local districts, or even of individual states. It is based partly on the physical fact that the problem transcends state boundaries and can be handled as a unit only by some authority coextensive with not less than half a dozen states (R. 121, Sec. 39). It is a fact, not logic, that no association of the states involved, along the lines of the association of states in connection with the Colorado River, has received serious consideration. Logic suggests as at least one possibility a levee and drainage district, coextensive with the area subject to floods, with the customary assessment of benefits and damages within the whole district. One virtue of such a district would be that it would solve the present problem along accepted lines and would compensate those damaged.

Two general schools of thought as to the proper method of flood control by the Federal Government developed. One of the prevalent schools of thought, the tenets of which became embodied in the Jadwin Plan (House Document 90, R. 119) and then became enacted into the law which is



at the basis of this litigation (Flood Control Act of May 15, 1928, R. 118), holds that most of the alluvial valley can and should be protected from all but extreme floods by levees, and that a large part can and should be protected even from extreme floods by providing for the overflow of extreme floods into controlled and limited special districts.

The other school of thought, the tenets of which ultimately have become generally known as the Markham Plan, is not voiced in any single official document in complete form. Various expressions appear in different official documents since General Markham has succeeded General Jadwin, and certain portions of the Markham Plan have been enacted into law, the most significant law for present purposes being the Overton Bill (Flood Control Act of June 15, 1936, R. 154). Officially, the Jadwin Plan is still the adopted plan, and the Markham Plan is being followed, partly with express authority of law and partly under the general powers of the War Department, only in an experimental way. The tenets of this second school of thought hold that the overflow provided for in the Jadwin Plan probably can and should be largely prevented by a series of works which would include such things as reforestation and the checking of soil erosion, to restore, at least in some degree, what is conceived as a natural condition of slow precipitation runoff, and two types of work of more direct interest in the present suit, to wit, retention reservoirs which would hold water in the upper reaches of the tributaries with a controlled outlet to the Mississippi River, and continuous work straightening and stabilizing the channel of the Mississippi River itself by means of cutoffs and other work to speed up river runoff.

The second school of thought was in existence at the time the Jadwin Plan was formulated, and the series of works contemplated by the second school of thought was expressly rejected and the overflow areas were adopted in the Jadwin Plan on the ground that the expense of the

series of works would be prohibitive and that, regardless of expense, they would be inadequate. (See House Document 90, R. 119.)

The Boeuf River Basin was selected in the Jadwin Plan as one of the overflow areas. It is admirably adapted for that purpose (R. 124, Sec. 119). It is on the west side of the river in Arkansas, opposite a much larger alluvial area in Mississippi, which Mississippi area was in fact flooded in the 1927 flood because of levee failure. The Boeuf Basin is a portion of the general Mississippi River Basin lying between the Macon Ridge, an alluvial ridge parallel to the Mississippi River, high enough that it has not been flooded in historical times, and the true hills farther west of the river. The Boeuf River is really a bayou which ties in with the Mississippi system both at its top and its bottom. The Jadwin idea was that the levee at the head of the Boeuf Basin, high enough to keep out ordinary high water but not extreme floods, with higher levees elsewhere, would sacrifice that smaller Arkansas Basin for the benefit of the much larger area in Mississippi, and, by way of general relief, other areas from Cape Girardeau to the Gulf—provided construction and operating work was directed at insuring that the Boeuf Levee would go before other levees were threatened. A subordinate idea was to protect part of the Boeuf Basin itself, and especially bottoms leading into the Boeuf Basin, by side levees, sometimes called "guide levees" because they would confine the overflow to the more central part of the Boeuf Basin.

The devices adopted in the Jadwin Plan to insure the sacrifice of the Boeuf Basin for the benefit of the general Mississippi Basin consist primarily of a prohibition against the raising or strengthening of the portion of the Mississippi River levee across the head of the Boeuf Basin, with provision for blowing it at the critical stage if it should not go on account of its weakness, coupled with the raising and strengthening of all other levees.

The construction of the Boeuf Spillway involved (1) the raising and strengthening of adjoining levees, by intent and in fact specifically as part of the Boeuf Floodway, although also functioning as part of the general flood control works; (2) the leaving of an unraised, unstrengthened section, the "fuse plug"; (3) the construction of guide levees, partly to extend the northern raised and strengthened levees southward to confine the spillway to the Boeuf Basin proper, partly to confine the spillway to the central part of the Boeuf Basin. Of this work, the adjoining levees have been raised and strengthened, except as noted in the next sentence. The unraised, unstrengthened levee is longer than it would be after junction of the raised and strengthened levees with completed side levees. The side levees went as far as action for condemnation of the right of way, later abandoned, but have not been constructed. The present physical situation is such that the unraised, unstrengthened levee does function as a fuse plug and the Boeuf Basin is a spillway, although the flooded area would be much larger than originally contemplated. Plaintiff's land has been "interfered with" in the same manner and to the same degree as though the project were fully completed.

So far, a kind Providence has refrained from sending an excessive flood to the Boeuf River area, so that it has never actually been used as a spillway, although the corresponding New Madrid Spillway unfortunately has been put to use and, when its levee did not go out quickly enough to satisfy the federal authorities, it was blown. There is a possibility that the Boeuf River Spillway may never actually be used and for that matter, that the New Madrid Spillway may never again be used, provided experiments with the works contemplated by the Markham Plan and others as yet unthought of lead to conclusions which result in the adoption of those works, provided

appropriations are secured and the works constructed, provided they prove as efficient as hoped, provided appropriations are actually made for the continuous channel work which is an essential part of the plan and provided all this is done before an excessive flood occurs. However, the Government engineers estimate that the Boeuf Spillway will be used on the average of once in twelve years (R. 124, Sec. 119).

The above statement involves negation of recitals in the statement in the brief for the United States as follows:

The brief for the United States recites that the Boeuf Basin "is part of a larger basin known as the Tensas Basin." Without discussing the abstract geographical question, the Boeuf Floodway lies west of the Macon Ridge, between the Ridge and the true hills, and the Eudora Floodway proposed in the Flood Control Act of 1936 lies east of that Ridge. The two overlap only to a small extent above and below the Ridge, due to the fact that proposed guide levees for the two are not identical. Plaintiff's farm happens to lie north of the Ridge in such a position that if guide levees are placed precisely where proposed, it will lie in both floodways.

The brief for the United States mentions "the natural highwater bed of the Mississippi River." Common knowledge and the law recognize three river levels: the normal bed of the river, the highwater bed, which includes sloughs and the like, and the flood area. The flood area is not part of the bed of the river at all. A river floods when it gets out of its bed. The Boeuf Basin and the Tensas Basin are not, as stated by the Government, "in the natural highwater bed of the Mississippi River." They are part of its flood area.

The brief for the United States recites that the Boeuf Basin "was always subject to the servitude of flooding." That basin and no part of the Mississippi Basin was "sub-

ject to a **servitude** of flooding," prior to the Flood Control Act. In the course of nature the flood area of the river, including the Boeuf Basin, was subject to periodic inundation, but **servitudes** for floodways were first created by the Flood Control Act.

The brief for the United States recites "The land was flooded in 1912, 1913, 1919, 1921 and 1922 and in 1927." The land has been flooded from time immemorial but the reference to specific floods is misleading, for it was only after 1927 that the Arkansas River Levee was built and the land protected from all sides.

The brief for the United States recites "the lands in the floodways retained the same measure of protection they had theretofore enjoyed." In the form in which made, as applicable to all of the "floodways" created by the Flood Control Act, the recital is not remotely accurate. As applicable specifically to the Boeuf Floodway, it is true that in certain particulars, specifically in connection with ordinary high water, the Boeuf Floodway retained the same measure of protection it had theretofore enjoyed, but it is equally true that in other respects, specifically in connection with extreme floods, all right of protection was withdrawn by the act. The Government took the right, both in connection with the construction of flood control works and in connection with the operation of flood control works after they were constructed, to take whatever steps might be necessary to insure that, in extreme floods, the Boeuf Basin and not other areas would be flooded, thus withdrawing all protection from the Boeuf Basin. This included the right to blow the Boeuf Basin Spillway Levee, a right which already has been exercised in connection with the analogous New Madrid Spillway Levee.

The brief for the United States recites "the Jadwin Plan was only tentative." The fact is that the plan, as embodied in House Document 90, was enacted into law in the Flood Control Act of 1928.



The brief for the United States recites that Congress "did not adopt all features of the plan, especially in view of the engineering differences between it and a plan submitted by the Mississippi River Commission." It goes on to say that these differences were referred to the Mississippi River Flood Control Board. The fact is that, on recommendation of this board, all of the Jadwin plan was adopted and the proposals of the plan submitted by the Mississippi River Commission were rejected;

The brief of the United States says, "The Boeuf River Floodway \* \* \* was never begun, 'due to local opposition' and an injunction." The injunction was denied. "Local opposition" may not nullify the provisions of the Flood Control Act. It is not a statement of fact, but is a conclusion of mixed law and fact to say that the Boeuf floodway was never begun and the conclusion is one of the major points in controversy.

The brief for the United States recites that "**Thereafter**, pursuant to the **general authority** of the Mississippi River Commission, **independent of the 1928 act**, the levees on the south side of the Arkansas River were reconstructed \* \* \*. Moreover, by means of cut-offs, the Mississippi River was shortened by one hundred miles." These independent facts are true but immaterial. Similarly the brief of the United States recites, "Congress abandoned that part of the plan of the 1928 act which affected the Boeuf Floodway and, in lieu thereof, has created the Eudora Floodway. The Boeuf Floodway is no longer considered a part of the plan for flood control." This recital is neither true nor material. The Eudora Floodway was to be substituted for the Boeuf Floodway under the provisions of the Act of 1936, only under specified conditions. These conditions proved impossible of accomplishment and the Eudora Floodway has not been and can never conceivably be substituted for the Boeuf Floodway. Not only was the Boeuf Floodway begun, the law requires its completion. All of

the statements are immaterial. If, as contended by respondents, the Boeuf Floodway was not merely a project, but was actually 90 per cent constructed, the abandonment, not of the mere proposal of a Boeuf Floodway, but of an actual existing Boeuf Floodway, cannot relieve the Government of its obligation to compensate for the taking of the Boeuf Floodway.

The brief for the United States recites: "The construction of cut-offs and channel stabilization and the reconstruction of the levees on the south bank of the Arkansas River have resulted in a greater protection and security to respondents' land than it ever before had \* \* \*. No additional servitude has been placed upon respondents' land." If it were true that the Government had taken the Boeuf Floodway and then later had succeeded in adopting devices which obviated the necessity for its use as a floodway, the facts might suggest that it would be exacting the "pound of flesh" to insist on payment for the floodway after it had ceased to be used as such. However, in addition to the fact that the Arkansas River and the channel work were independent of and subsequent to the creation of the Boeuf Floodway, the channel work is solely experimental, anticipated benefits are in the face of past experience and whether it will be permanently beneficial is speculative. In any event land values in the Boeuf Floodway have not yet recovered on the strength of the channel work. The Arkansas River levee is helpful in connection with Arkansas River floods and even in connection with backwater from Mississippi River floods, but it has no effect whatever on the use of a portion of the Mississippi River levee as a fuse plug. The record shows that additional protection against ordinary highwater, such as that afforded by the Arkansas levee, is being given the Boeuf Floodway from time to time, but the record also shows that the Boeuf Floodway is subjected to the servitude created, not by nature, but by the Flood Control Act, that all flood control

works shall be so constructed and shall be so operated as to insure that it is the Boeuf Floodway and not other areas which shall carry excess flood water which cannot be carried in the leveed flood area. Further, the record shows that once the fuse plug has gone out or has been blown pursuant to the plans of the Government, the Boeuf Floodway will be wholly without protection, and protection, even against ordinary highwater, can be re-established only if the Government reconstructs the levee. There is no provision in law for such reconstruction. The War Department indicates that it is its intention to try to get the necessary funds to reconstruct when necessary, but that is a matter of grace which has no bearing on the original taking, except as it might tend to limit the drop in market price of the land due to the taking.

#### THE INTEREST OF THESE RESPONDENTS.

A considerable portion of the testimony in the present case concerns the amount of compensation for the Sponenbarger "forty." For the present purposes of these respondents it is sufficient to say that the testimony disclosed that the creation of the Boeuf Floodway did, in fact, result in at least some decrease in the market value of the Sponenbarger "forty." This fact stands out after all due allowance is made for the fact that the depression followed within eighteen months and tends to obscure the situation. It stands out after a consideration of the testimony of individual witnesses about elements tending to raise or decrease the market value, none denying that the market value did decrease.

The primary concern of these respondents is that they be so disposed of in the present appeal that they not be eliminated from consideration as possible "owners" of the land, provided the cause of action against the Government

is sound and compensation is awarded the owners of the land.

While Mrs. Spoenenbarger is the fee owner of the particular "forty," she does not own it free and clear. Among other incumbrances, running into millions of dollars, this "forty," together with the whole of the lands in the Boeuf River basin, in which like easements were taken, at the time the suit was filed, was subject to the lien of the following bond issues, in which these respondents are interested (R. 291-297):

1. Southeast Arkansas Levee District, October 1, 1919, Mercantile-Commerce Bank and Trust Company, Trustee, \$490,000.00.

2. Southeast Arkansas Levee District, March 1, 1921, Mercantile-Commerce Bank and Trust Company, Trustee, \$400,000.00.

3. Southeast Arkansas Levee District, March 1, 1923, Mercantile-Commerce National Bank, Trustee, \$285,000.00.

4. Southeast Arkansas Levee District, November 1, 1924, Mercantile-Commerce National Bank, Trustee, \$282,000.00.

5. Southeast Arkansas Levee District, March 1, 1926, Mercantile-Commerce Bank and Trust Company, Trustee, \$100,000.00.

6. Southeast Arkansas Levee District, January 1, 1927, Mercantile-Commerce Bank and Trust Company, \$334,000.00.

To secure these bond issues, the particular "forty" was subject to a lien of an annual tax of 30 cents per acre per year in favor of the Southeast Arkansas Drainage District to secure its bonds until its bonded debt is paid. The other lands in the Boeuf River basin are subject to similar liens (R. 4-81, 291, 297).

### **SPECIFICATION OF ERROR.**

The trial court erred in the conclusion on which it based its judgment, the conclusion being worded in the opinion of the trial court as follows:

“In our opinion it cannot be successfully contended that plaintiff's land has been appropriated by the defendant, thereby giving rise to implied contract to compensate the owner.”



## POINTS AND AUTHORITIES.

1.

The trustees are proper parties to this action and were properly brought in by the Government, inasmuch as plaintiff had not made them parties in the beginning.

Hurley v. Kincaid, 285 U. S. 95;

Jacobs v. United States, 290 U. S. 13;

Flood Control Act, Title 33, Section 702-b, U. S. C.

A., Title 40, Sections 257 and 258, U. S. C. A.,

Title 33, Section 591, U. S. C. A.;

Crawford & Moses' Digest of the Statutes of Arkansas 1921, Section 3930;

Crawford & Moses' Digest of the Statutes of Arkansas 1921, Section 3932;

Hare v. Fort Smith & Western Railroad Company, 104 Ark. 187;

Schichtl v. Home Life & Accident Co., 169 Ark. 415;

Missouri and North Arkansas Railroad Co. v. Chapman, 150 Ark. 334;

Acts of Arkansas 1917, Sections 10 and 11 of Act No. 83.

2.

The creation of the Boeuf Floodway on its face seems obviously a taking of an easement in the land of the Boeuf Basin. It accordingly probably will be most helpful to negative the points advanced as arguments that it did not constitute a taking. The position of these appellants is that the creation of the floodway constituted a taking of an easement by the Government, and the creation of a servitude on the land in the Boeuf Basin, in such a sense that just compensation is payable by the Government under the common-law rule and under the constitutional provision that the Government must pay just compensa-

tion for property taken for public purposes. This is so notwithstanding the following:

1. It was an easement, not the fee, which was taken. This includes the idea that permanent possession was not taken, but merely the right to occasional possession.

2. No flood has as yet happened and so the right to temporary possession under the easement has not, in fact, yet been exercised.

3. Engineering progress subsequent to the taking may ultimately justify the future abandonment of the floodway.

4. Economic and other developments subsequent to the taking may have caused fluctuation in the market price.

5. The Overton Bill makes possible the substitution of the Eudora for the Boeuf River Spillway, that substitution not having been made and by now having proved practically impossible.

6. The essence of the taking consists of the creation of a system which intentionally sacrifices the interest of the Boeuf Basin landowners for the good of the greater number of the Mississippi Alluvial Valley landowners and for the good of the United States as a whole. This is especially true in that the method to accomplish the purpose includes not merely the construction of levees elsewhere, but includes, also, first, depriving the Boeuf Basin landowners of their common-law right, which is part of their property in their land, to protect themselves by strengthening and raising their own levees, and, second, includes the construction and operation of the whole Mississippi Valley Levee system by the Government in such manner as to insure that all future Mississippi River floods will flood the Boeuf Basin and not other portions of the Mississippi Alluvial Valley.

The cases are all cited in Mrs. Sponenbarger's brief and will not be repeated here.

## ARGUMENT.

### POINT 1.

These appellants are not parties to this proceeding of their own volition, having in the first instance filed their claims in the Court of Claims, the tribunal of their own choice. The primary interest of these appellants in this proceeding is that any decree which may be entered be properly worded with reference to them so that the real intention of the Court with regard to them may be accomplished and their interests protected.

The essential nature of the claims of the owners of any interests in the property taken is the same as if the action were an action by the Government for the condemnation of the property. *Hurley v. Kincaid*, 285 U. S. 95; *Jacobs v. United States*, 290 U. S. 13.

The Flood Control Act, Title 33, Section 702-b, United States Code Annotated, provides for the acquirement of lands and easements by condemnation by the Secretary of War. The said act does not set forth the procedure further than that the action shall be instituted in the District Court in which the land or easement is located; and that the Court shall appoint three commissioners to ascertain the value of the property and assess the compensation to be paid. There are, however, general statutes which require the procedure to be the same as the practice, pleadings, forms and modes of proceedings of the courts of record in the state within which the District Court is held, where condemnation is instituted by the Secretary of the Treasury or any other officer. Title 40, Sections 257 and 258, United States Code Annotated. Another general statute requiring condemnation proceedings by the United States to conform to the law of the state where the pro-

ceedings are instituted is Title 33, Section 591, United States Code Annotated.

A statute of the State of Arkansas gives to the owner of property the right to recover damages when his property has been appropriated by a corporation authorized by law to appropriate private property for its use. Section 3930, Crawford & Moses' Digest of the Statutes of Arkansas 1921, is as follows:

"Whenever any corporation authorized by law to appropriate private property for its use shall have entered upon and appropriated any property, real or personal, the owner of such property shall have the right to bring an action against such corporation in the circuit court of the county in which said property is situated for damages for such appropriation at any time before an action at law or in equity for the recovery of the property so taken, or compensation therefor, would be barred by the Statute of Limitations."

And a statute of Arkansas gives to the defendant in any such action the right to bring in all parties who have an interest or claim to have an interest in the property in controversy. That statute is Section 3932, Crawford & Moses' Digest of the Statutes of Arkansas 1921, and it reads as follows:

"Proceedings instituted under this act shall be governed by the rules of pleading and practice prescribed for the government of proceedings in the circuit court. The defendant shall have the right to bring in all parties having or claiming an interest in the property in controversy, and the court shall make the proper orders of the distribution of the compensation recovered in the action among such parties as may be entitled thereto, and shall include in the judgment in said proceedings an order condemning said property

for the public use to which it may have been appropriated.”

And in condemnation proceedings the Supreme Court of Arkansas has frequently held that all persons owning an interest in the property are proper parties. *Hare v. Fort Smith & Western Railroad Company*, 104 Ark. 187; *Schichtl v. Home Life & Accident Company*, 169 Ark. 415; *Missouri and North Arkansas Railroad Company v. Chapman*, 150 Ark. 334.

The act creating the Southeast Arkansas Levee District (Section 10 of Act No. 83 of the Acts of Arkansas for the year 1917) makes the tax levied by the Legislature a lien on all of the property in the district. Said section reads as follows:

“The taxes herein levied shall constitute a lien, and are a lien on all of the property in said levee district, against which they are assessed, \* \* \*.”

Section 11 of said act, in part, provides as follows:

“The board is hereby required to set aside annually from the first revenues collected from any source whatever, a sufficient sum to pay the interest for the year on all outstanding notes, certificates and bonds, and any notes, certificates and installments of bonds that may become due in the year, and for the purpose of securing the payment of said notes, certificates and bonds and interest, a lien is hereby charged on all lands, lots, railroad embankments and tramways, and all other property in said district subject to levee tax paramount to all other liens. For the purpose of paying said notes, certificates and bonds and interest said board may execute an instrument of pledge in due form of law.”

Some courts have held that, where property is damaged only but not taken in fee, the mortgagee is required to



show that the value of the remaining property is not sufficient security before the mortgagee can assert any rights. Some cases to that effect have been cited by the original plaintiff in her brief in the courts below and probably will be cited in this court. These cases are not in any wise applicable here for two reasons: First, the overwhelming weight of evidence is to the effect that, after the beginning of the flood-control project by the Government, plaintiff's land had a value of not more than \$10.00 or \$15.00 an acre, which is less than the liens against the land, whereas it was of the value of \$125.00 an acre immediately preceding the beginning of the work by the Government; second, the question of the amount of liens against the land and its relation to the value of the land has not yet been inquired into and the time for discussing the point has not arrived.

The lien against the land in which these respondents are interested is 30 cents an acre per year in favor of the Southeast Arkansas Levee District, until its indebtedness is paid, to secure an aggregate indebtedness of \$1,891,000, with interest from March 1, 1932.

## POINT 2.

A very extensive field is properly to be considered in deciding this matter. It is perhaps not inappropriate that the Court, in view of the importance of the issues, should give consideration to the whole field and should express itself quite generally.

These respondents, however, conceive that the truly critical point is a definite and simple one, which may be stated as follows:

The Government has deprived the Boeuf Basin land-owners of property, to wit: Of certain of the attributes of their property rights in the land in the Boeuf Basin, by

designing and constructing a levee system deliberately intended to sacrifice the Boeuf Basin lands for the benefit of a much larger group and for the public good and, among other things, has deprived the Boeuf River land-owners of that particular attribute of their property which consisted of their common-law right to protect their lands against floods by raising and strengthening their protective levees and by giving the Government the right to sacrifice even the existing levees when necessary to accomplish the general purpose. These respondents are not contesting the wisdom of the plan nor the right of the Government to adopt it, but are only insisting that the few who are sacrificed for the benefit of the many be compensated either by the many or at public expense.

The Government, in turn, is not denying that compensation should be paid if there were a taking, but denies that there was a taking, purports to doubt the probability of any physical damage to the lands on the theory that the floodway will probably never be used and contends that if there has been any diminution of the market value of the lands in the Boeuf Basin that comes under the head of consequential damages.

If, following the crevassing of the levee in the 1927 flood, **the local Levee District** in Mississippi had repaired, raised and strengthened its levee with the result that unless the Arkansas Levee District did the same thing Arkansas, and not Mississippi, would be flooded by the next flood, doubtless there would have been some decrease in the market value of the Arkansas lands and that decrease would be in the nature of a consequential damage and not actionable. The crux of the matter is that **the Government** repaired, strengthened and raised the Mississippi levee as part of a plan deliberately to sacrifice Arkansas for the benefit of Mississippi and other states and **the Government** deprived Arkansas of the right similarly to strengthen and raise

its levee, expressly taking in addition a right to sacrifice even the existing levee. It is for the deliberate sacrificing of Arkansas and the deliberate taking of the common-law right to protection and deliberate taking of the right to sacrifice the existing levee in Arkansas that compensation is due.

The Government did allow compensation in the analogous New Madrid Spillway. It attempts to differentiate the New Madrid Spillway from the Boeuf River Spillway by saying that the New Madrid Levee was lowered five feet. It is immaterial whether the existing levees were lowered or were permitted to remain at their same strength and level. Indeed, it would have been immaterial if some increase in height and strength were allowed; the point is that, although it may not have deprived them of all rights, the Government deprived the landowners of the right to increase the height and strength of their levee to the point where lands other than their own would suffer from extreme flood and took the right to breach the existing levee.

For the most part the trial court in its opinion displayed such a grasp of the situation that the easiest way for these respondents to state their case is to refer to the trial court's opinion, accepting it in so far as it can be accepted, and pointing out its error. The view of these respondents is, of course, the view of the Court of Appeals.

There is no dispute between the Government and the appellants, and the trial court makes a correct finding on one point, to wit, landowners have a common-law and constitutional right to erect levees on their own land and to adopt any other methods of flood protection on their own land. This property right can be taken, even under the navigation power, only on payment of compensation. • The trial court in its opinion errs in the finding that this right

had been impaired prior to the Flood Control Act and was not withdrawn or limited in the case of the Boeuf Basin by the Flood Control Act. The Court says:

**"The fuse plug section of the levee has not been disturbed, but plaintiff asserts that the landowner no longer has the same right to protect the levee that formerly existed. The grade of this levee was established by the Mississippi River Commission, acting under authority duly conferred. The landowners prior to 1928 had no right to elevate the established grade. There is nothing in the act that restricts the privilege of property owners to participate in a flood fight by supporting the river front levee when it is in danger. They did so participate during the 1927 flood."**

The trial court completely misapprehended the function and authority of the Mississippi River Commission and the statements emphasized are the direct contrary of the fact. The Mississippi River Commission never had any authority to establish any levee grade. Its sole function was advisory. It had announced that in its judgment levees of certain grades and sections, the so-called 1914 grade and section, varying from place to place, would furnish complete flood protection. The grade and section of the Boeuf River Levee were fixed by the local levee board, which borrowed from the lien claimants to build the levee. The local levee board might have fixed any grade and section. The Mississippi River Commission standard levee was in no sense a maximum levee; it was a minimum levee. Even as a minimum levee it was without authority of law except as a recommendation. The most emphatically worded provision of the Jadwin Plan is one that does restrict the privilege of property owners of participating in a flood fight. In 1937 the landowners were permitted to participate in a flood fight to maintain their levee at the 1914 grade and section—there were places not up to that grade

and section and it was determined that the particular flood crest then imminent would not endanger the adjoining higher levees—but had other levees been threatened the Government would have gone even to the extreme of blowing the Boeuf Levee. The critical point is that the Government took charge of the "fuse plug" and dictated what might and what might not be done.

The market value of this land is always relatively low because of the flood hazard. If land as productive as this were located as Northern Illinois and Iowa land is located, it would be selling at \$400.00 or \$500.00 an acre. The inevitable flood hazard is that any levee may crevasse, no matter what precautions are taken, and this danger has been, and, for that matter, still is, uniform over the whole of the alluvial basin. However, it is perfectly logical that the market value of lands in the Boeuf Basin dropped to nothing when all the knowledge and resources of the Federal Government were put into a plan to insure that it would be the Boeuf Basin and no other area in the middle river that was flooded. Only a small fraction of the total tillable area protected by levees is actually tilled, and the plan to sacrifice the Boeuf Basin for the rest quite naturally drives landowners from the Boeuf Basin to the other territory with a total loss of market value in the Boeuf Basin, and, probably, with no appreciable increase in the market value in the rest of the area.

It is immaterial whether or not the Government feels that the situation is logical. It is immaterial whether it is due to a true or false estimate of the future. It is immaterial whether it is due to physical or to psychological factors. It is immaterial whether the Government says that buyers' refusal to buy is due to craven fear or to a laudable determination that their families shall take no risks of drowning. It is also immaterial that a market value may some day return because new methods of flood con-



trol may be discovered which will eliminate the hazard or because the new generation, which knew not the flood of 1927, may overlook it. It is also immaterial that the taking occurred at the peak of high prices, and that the depression within a year and a half went a long way toward temporarily taking away the market value of all lands.

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# SUPREME COURT OF THE UNITED STATES.

No. 72.—OCTOBER TERM, 1939.

United States of America, Petitioner,  
 vs.  
 Mrs. Julia Caroline Sponenbarger, et al.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[December 4, 1939.]

Mr. Justice BLACK delivered the opinion of the Court.

Respondent sued the United States under the Tucker Act,<sup>1</sup> alleging that the Mississippi Flood Control Act of 1928<sup>2</sup> and construction contemplated by that Act involved an "intentional, additional, occasional flooding, damaging and destroying" of her land located in Desha County, Arkansas. She maintained that her property had thus been taken for a public use for which the Government is required to pay just compensation by the Fifth Amendment.<sup>3</sup> In addition, she asserted a statutory right of recovery under the Act itself. After full hearing, judgment for the Government was entered in the District Court.<sup>4</sup> The Circuit Court of Appeals reversed.<sup>5</sup> Because of the importance of both the legislation and the principles involved, we granted certiorari.<sup>6</sup>

A summary of the history behind the Mississippi Flood Control Act of 1928 clarifies the issues here. Respondent's land is in the alluvial valley of the Mississippi River. Alluvial soil, rich in fertility, results from deposits of mud and accumulations produced by floods or flowing water. Thus, floods have generously contributed to the fertility of the valley. However, the floods that have given fertility have with relentless certainty undermined the security of life and property. And occupation of the alluvial valley of the Mississippi has always been subject to this constant hazard.

<sup>1</sup> 28 U. S. C. 41(20).  
<sup>2</sup> c. 569, 45 Stat. 534; 33 U. S. C. 702(a).  
<sup>3</sup> Cf. *Jacobs v. United States*, 290 U. S. 13, 16.  
<sup>4</sup> 21 Fed. Supp. 28.  
<sup>5</sup> 101 Fed. (2d) 506.

<sup>6</sup> — U. S. —. Respondent primarily claims that governmental operations under the Flood Control Act have resulted in taking for public use her lands lying in the proposed Boeuf Floodway. This Floodway was originally intended to cover a vast area roughly fifteen miles wide and one hundred and twenty-five miles long.

To enjoy the promise of its fertile soil in safety has, for generations, been the ambition of the valley's occupants. As early as 1717, small levees were erected in the vicinity of New Orleans. Until 1883, piecemeal flood protection for separate areas was attempted through uncoordinated efforts of individuals, communities, counties, districts and States. Experience demonstrated that these disconnected levees were utterly incapable of safeguarding an ever increasing people drawn to the fertile valley. Under what was called the Eads plan, the United States about 1883 undertook to cooperate with, and to coordinate the efforts of the people and authorities of the various river localities in order to effect a continuous line of levees along both banks of the Mississippi for roughly nine hundred and fifty miles—from Cape Girardeau, Missouri, to the Gulf of Mexico.<sup>7</sup> Recurrent floods, even after the eventual completion of this tremendous undertaking, led to the conclusion that levees alone, though continuous, would not protect the valley from floods. And in 1927 there occurred the most disastrous of all recorded floods. In congressional discussion of the 1928 Act, it was said—as the evidence here discloses—that “There were stretches of country [in Arkansas] miles in width and miles in length in which . . . every house, every barn, every outbuilding of every nature, even the fences, were swept away. It was as desolate as this earth was when the flood subsided.”<sup>8</sup> Respondent's land, under fifteen to twenty feet of water, was left bare of buildings of any kind in this 1927 flood.

The 1928 Act here involved accepted the conception—underlying the plan of General Jadwin of the Army Engineers—that levees alone would not protect the valley from floods. Upon the assumption that there might be floods of such proportions as to overtop the river's banks and levees despite all the Government could do, this plan was designed to limit to predetermined points such escapes of floodwaters from the main channel. The height of the levees at these predetermined points was not to be raised to the general height of the levees along the river. These lower points for possible flood spillways were designated “fuse plug levees.” Flood waters diverted over these lower “fuse plug levees” were intended to relieve the main river channel and thereby prevent general flooding over the higher levees along the banks. Additional “guide levees” were to be constructed to confine the diverted flood waters

<sup>7</sup> For the background of this legislation, see *Jackson v. United States*, 230 U. S. 1.

<sup>8</sup> 69 Cong. Rec., Part 8, p. 8191.

within limited floodway channels leading from the fuse plugs. The suggested fuse plug which respondent claims would damage her property was to be at Cypress Creek, within two to two and one-half miles of her land, and her land lies in the path of the proposed floodway to stem from this particular fuse plug.

The 1928 Act provided for a comprehensive ten-year program for the entire valley, embodying a general bank protection scheme, channel stabilization and river regulation, all involving vast expenditures of public funds. However, before any part of this program was actually to be carried out, the Act required extensive surveys "to ascertain the best method of securing flood relief in addition to levees, before any flood control works other than levees and revetments are undertaken." Lands intended for floodways were, pending completion of the floodways, to enjoy the protection already afforded by levees.

The District Court found—

Respondent's land lies in that part of the Boeuf Basin which the plan of the 1928 Act contemplated as a diversion channel or floodway. This Basin has always been a natural floodway for waters from the Mississippi,<sup>9</sup> and respondent's lands, and other lands similarly situated, have been repeatedly overflowed by deep water despite the presence of strong levees.<sup>10</sup> The United States has not caused any excessive flood waters to be diverted from the Mississippi through the proposed Boeuf fuse plug (at Cypress Creek) or floodway, and respondent's property has not been subjected to any servitude from excessive floodwaters, which did not already exist before 1928. She still enjoys the same benefits from the Cypress Creek drainage system as when it was created before 1928, and the government program has not "in any wise, nor to any extent increased the flood hazard thereto." No work was ever commenced or done within the area of the proposed Boeuf floodway, and the fuse plug heading into it was never established. This floodway as a whole has been abandoned and the Eudora floodway substituted. However, work done under the 1928 Act has shortened the river by cut-offs and dredging and the river has been lowered five or six feet, with the greatest improvement in the vicinity of the proposed fuse plug. Levee protection to lands such as plaintiff's has not been reduced. In fact, plaintiff's land has been afforded additional protection by virtue of the fact that this government improvement program has materially

<sup>9</sup> This Basin also was found to be a floodway for waters from the Arkansas and Red Rivers.

<sup>10</sup> Her lands were found to have been flooded in 1912, 1913, 1919, 1921, 1922, 1927.

"Flat" (White)

reduced the crest of the river at all times, including flood crests, and her land has also been protected by the Government's reconstruction of levees on the Arkansas River pursuant to its general program. In 1935, her property would have been flooded but for the work done by the Government which has kept her land free of overflow since 1928. Lands, such as respondent's, located immediately behind levees along the main stem of the Mississippi, are liable to be inundated and destroyed by the breaking of river front levees and from natural crevasing, regardless of the height and strength of the levee. Loss in market value of respondent's property, since 1927, has not been caused by any action of the Government, but is due to the flood of 1927, the depression and other causes unconnected with the governmental program under the 1928 Act. The United States has in no way molested respondent's possession or interfered with her right of ownership. She has remained in uninterrupted possession of her property operating it as a farm and borrowing money upon it as security.

From these findings the District Court concluded as a matter of law that—

(1) Respondent's property had not been taken within the meaning of the constitutional prohibition against taking without compensation;

(2) Under the facts of this case, respondent had no statutory right of recovery under the 1928 Act itself.

In reversing the District Court's judgment, the Circuit Court of Appeals decided that the Boeuf floodway had not been abandoned by the Government, but was in operative existence notwithstanding that the proposed guide levees along the floodway had not been built and levees on the Mississippi both immediately above and below the proposed fuse plug had not been raised above the height of what would have been the fuse plug levee. The Circuit Court of Appeals said that "By the provisions of this plan of flood control . . . [respondent's land] is subjected to a planned and practically certain overflow in case of the major floods contemplated and described. No one can foretell when such may occur, but that is the only remaining uncertainty. . . . If, and when, such floods do occur, serious destruction must be conceded." Upon these conclusions, the Circuit Court held that there was a taking of respondent's property.

*First.* This record amply supports the District Court's finding that the program of improvement under the 1928 Act had not increased the immemorial danger of unpredictable major floods to which respondent's land had always been subject. Therefore, to hold the



Government responsible for such floods would be to say that the Fifth Amendment requires the Government to pay a landowner for damages which may result from conjectural major floods, even though the same floods and the same damages would occur had the Government undertaken no work of any kind. So to hold would far exceed even the "extremest"<sup>11</sup> conception of a "taking" by flooding within the meaning of that Amendment. For the Government would thereby be required to compensate a private property owner for flood damages which it in no way caused.

An undertaking by the Government to reduce the menace from flood damages which were inevitable but for the Government's work does not constitute the Government a taker of all lands not fully and wholly protected. When undertaking to safeguard a large area from existing flood hazards, the Government does not owe compensation under the Fifth Amendment to every landowner which it fails to or cannot protect. In the very nature of things the degree of flood protection to be afforded must vary. And it is obviously more difficult to protect lands located where natural overflows or spillways have produced natural floodways.

The extent of swamps and overflowed lands in the Boeuf floodway and the history of recurrent floods that have passed through it, support the District Court's finding that the proposed Boeuf floodway is a naturally created floodway. And the Government's problem was by channel stabilization, dredging, cut-offs or any effective means, to prevent diversions from the Mississippi at all points if possible. But if all diversions could not be prevented, the Government sought to limit the flooding to the least possible number of natural spillways heading into natural floodways. If major floods may sometime in the future overrun the river's banks despite—not because of—the Government's best efforts, the Government has not taken respondent's property. And this is true, although other property may be the beneficiary of the project. The Government has not subjected respondent's land to any additional flooding, above what would occur if the Government had not acted; and the Fifth Amendment does not make the Government an insurer that the evil of floods be stamped out universally before the evil can be attacked at all.

The far reaching benefits which respondent's land enjoys from the Government's entire program precludes a holding that her property has been taken because of the bare possibility that some future

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<sup>11</sup> Cf. *Transportation Co. v. Chicago*, 99 U. S. 635, 642; *Pumpelly v. Green Bay Co.*, 13 Wall. 166.

major flood might cause more water to run over her land at a greater velocity than the 1927 flood which submerged it to a depth of fifteen or twenty feet and swept it clear of buildings. Enforcement of a broad flood control program does not involve a taking merely because it will result in an increase in the volume or velocity of otherwise inevitably destructive floods, where the program measured in its entirety greatly reduces the general flood hazards, and actually is highly beneficial to a particular tract of land.

The constitutional prohibition against uncompensated taking of private property for public use is grounded upon a conception of the injustice in favoring the public as against an individual property owner. But if governmental activities inflict slight damage upon land in one respect and actually confer great benefits when measured in the whole, to compensate the landowner further would be to grant him a special bounty. Such activities in substance take nothing from the landowner. While this Court has found a taking when the Government directly subjected land to permanent intermittent floods to an owner's damage,<sup>12</sup> it has never held that the Government takes an owner's land by a flood program that does little injury in comparison with far greater benefits conferred.<sup>13</sup> And here, the District Court justifiably found that the program of the 1928 Act has greatly reduced the flood menace to respondent's land by improving her protection from floods. Under these circumstances, respondent's land has not been taken within the meaning of the Fifth Amendment.

*Second.* Even though the Government has not interfered with respondent's possession and as yet has caused no flooding of her land,<sup>14</sup> respondent claims her property was taken when the 1928 Act went into effect and work began on its ten-year program because the Act itself involves an imposition of a servitude for the purpose of intentional future flooding of the proposed Boeuf floodway. But, assuming for purposes of argument that it might be shown that such supposed future flooding would inflict damages greater than all benefits received by respondent, still this contention amounts to no more than the claim that respondent's land was taken when the statutory plan gave rise to an apprehension of future flooding. This apprehended flooding might never occur for many reasons—one of which is that the Boeuf floodway might never

<sup>12</sup> *Jacobs v. United States*, *supra*; *U. S. v. Cress*, 243 U. S. 316; *U. S. v. Lynah*, 188 U. S. 445; *Pumpelly v. Green Bay Co.*, *supra*; cf. *Sanguinetti v. U. S.*, 264 U. S. 146.

<sup>13</sup> Cf. *Bauman v. Ross*, 167 U. S. 548, 574.

<sup>14</sup> Cf. *Marion & R. Valley R. Co. v. United States*, 270 U. S. 280, 282, 283.

be begun or completed. As previously pointed out, the Act directed comprehensive surveys before utilization of any means of flood control other than levees and revetments. In general language it adopted a program recommended by the Chief of Army Engineers, but Congress did not sweep into the statute every suggestion contained in that recommendation.

Since it envisaged a vast program, the Act naturally left much to the discretion of its administrators and future decisions of Congress.<sup>15</sup> Recognizing the value of experience in flood control, Congress and the sponsors of the Act did not intend it to foreclose the possibility of changing the program's details as trial and error might demand.

Here, it is clear that those charged with execution of the program of the 1928 Act abandoned the proposed Boeuf floodway and substituted another. Whatever the original general purpose of Congress as to that floodway and its fuse plug at Cypress Creek, congressional hearings, reports and legislation have approved their abandonment. Thus, respondent's contention at most is that the Government should pay for land which might have been in a floodway if that floodway had not been abandoned. We think this contention without merit.<sup>16</sup>

*Third.* Respondent's "right of self defense" against floods through locally built levees has not been taken away. The 1928 Act does not represent a self-executing assumption of complete control over all levees to the exclusion of the States and local authorities. Respondent's argument that it does rests upon Section 9 of the Act making Section 14 of the Act of March 3, 1899 (33 U. S. C. 408), which forbids interference with levees, "applicable to all lands, waters, easements and other property and rights acquired or constructed under the provisions of this [1928] Act." But Section 14 of the 1899 Act relates only to levees and other structures "built by the United States," and no local levees on which respondent could rely have as yet been "built by the United States" or "acquired . . . under the provisions of" the 1928 Act. In fact, a proposal that the Government assume control of local levees appeared in the original draft of the 1928 Act but was stricken out by amendment.<sup>17</sup> And the War Department, charged with its ad-

<sup>15</sup> Cf. *South Carolina v. Georgia, et al.*, 93 U. S. 4, 13. As to when legislation does not constitute self-executing appropriation, see *Bauman v. Ross*, 167 U. S. 548, 596-7; *Willink v. U. S.*, 240 U. S. 572.

<sup>16</sup> Whether recovery at law could be had upon a similar contention was left open by *Hurley v. Kincaid*, 286 U. S. 95. Cf. *Peabody v. United States*, 231 U. S. 530, 539, 540.

<sup>17</sup> 69 Cong. Rec., Part 7, pp. 7114, 7115.

ministration, has treated the Act as leaving local interests free to raise proposed fuse plug levees if they wish.<sup>18</sup>

*Fourth.* It is argued that the 1928 Act itself requires judgment for respondent even though her property was not "taken" within the Fifth Amendment. The pertinent provisions are—

"No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place: *Provided, however,* That if in carrying out the purposes of this Act it shall be found that upon any stretch of the banks of the Mississippi River it is impracticable to construct levees, either because such construction is not economically justified or because such construction would unreasonably restrict the flood channel, and lands in such stretch of the river are subjected to overflow and damage which are not now overflowed or damaged by reason of the construction of levees on the opposite banks of the river, it shall be the duty of the Secretary of War and the Chief of Engineers to institute proceedings on behalf of the United States Government to acquire either the absolute ownership of the lands so subjected to overflow and damage or floodage rights over such lands.

" . . . . . The United States shall provide flowage rights for additional destructive flood waters that will pass by reason of diversions from the main channel of the Mississippi River: . . . . ."

"This Court has previously decided that "the construction of levees on the opposite" bank of the Mississippi River which resulted in permanently flooding property across the river did not amount to a "taking" of the flooded area within the Fifth Amendment.<sup>19</sup> We need not here determine whether the provisions of the 1928 Act would themselves grant a statutory right to recover if respondent's land had been damaged as a result of levees constructed on the river's opposite bank. For Section 4 of the Act contains the further specific reservation "That in all cases where the execution of the flood-control plan herein adopted results in benefits to property such benefits shall be taken into consideration by way of reducing the amount of compensation to be paid." On this record it is clear that respondent's lands were not damaged, but actually benefited.

We do not find it necessary to discuss other questions presented.

The judgment of the Circuit Court of Appeals is reversed and that of the District Court is affirmed.

*Reversed.*

<sup>18</sup> Com. Doc. No. 2, House Committee on Flood Control, 71st Cong., 1st Sess.

<sup>19</sup> *Jackson v. United States*, *supra*, 22, 23.



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